DETERMINATION OF MERGER NOTIFICATION
M/21/079
UNIPHAR/NAVICORP

15 December 2022

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1. INTRODUCTION

Introduction

1.1 On 24 December 2021, in accordance with section 18(1)(a) of the Competition Act 2002, as amended (the *"Act"*), the Competition and Consumer Protection Commission (the *"Commission"*) received a merger notification form (the *"Merger Notification Form"*) concerning a proposed transaction whereby Uniphar plc (*"Uniphar"*) would acquire the entire issued share capital, and thus sole control, of NaviCorp Limited (trading as Navi Group) (*"NaviCorp"*), and thereby also acquire sole control of NaviCorp's wholly-owned subsidiaries Thera Pharmaceuticals Limited (*"Thera"*), CarePlus Pharmacy DAC, Touchplus Technologies Limited, and Pembroke Healthcare Limited[1] (together with Thera, the *"Subsidiaries"*) (the *"Proposed Transaction"*). Uniphar and NaviCorp are the parties to the Proposed Transaction (the *"Parties"*).

The Proposed Transaction

1.2 The Proposed Transaction is to be implemented pursuant to a share purchase agreement, dated 22 December 2021, between: (i) the current owners of NaviCorp, Fonthill Pharmaceuticals Limited and Mr Simon Healy[2] (together, the *"Sellers"*); (ii) Mr John Carroll;[3] and (iii) Uniphar (the "SPA").

1.3 Pursuant to the SPA, Uniphar will purchase the entire issued share capital of NaviCorp from the Sellers, thus acquiring sole control of NaviCorp and the Subsidiaries following the implementation of the Proposed Transaction.

[1] Pembroke Healthcare Limited is incorporated in England and Wales and the other Subsidiaries are incorporated in Ireland.

[2] Fonthill Pharmaceuticals Limited and Mr Simon Healy respectively hold shareholdings of approximately [redacted] in NaviCorp.

[3] [redacted]

The Undertakings Involved

The Acquirer – Uniphar

1.4 Uniphar is a public limited company registered in the State under company number 224324. Uniphar is listed on both the Euronext Dublin stock exchange and the London Stock Exchange.[4]

1.5 Uniphar is active in the healthcare services sector in the State with three main business divisions: (i) commercial and clinical; (ii) product access; and, (iii) supply chain and retail. These business divisions are discussed in further detail below.

(i) Commercial and clinical division

1.6 Uniphar is active in the provision of sales, marketing and distribution services to pharmaceutical and medical devices manufacturers through its commercial and clinical business division.

(ii) Product access division

1.7 Within its product access business division, Uniphar offers two distinct types of service: (i) *"On Demand Access"*, which are pharmacy-led services for the sourcing and supply of unlicensed medicines; and (ii) *"Exclusive Access"*, which are manufacturer-led services for controlling the release of speciality medicines.

(iii) Supply chain and retail division

1.8 Uniphar's supply chain and retail division ("SCRD") consists of:

a) wholesale and pre-wholesale activities;

b) franchise/symbol groups; and,

c) brokerage/buying groups.

[4] For more information, see https://www.uniphar.ie/.

(a) Wholesale and pre-wholesale

1.9 Uniphar is active in the supply of pharmacy-only human pharmaceutical products ("POHPPs"), over-the-counter ("OTC") products, front-of-shop ("FOS") products and veterinary pharmaceutical products in the State through its SCRD. Uniphar's SCRD operates as a link between pharmaceutical manufacturers and community and hospital pharmacies.

1.10 The SCRD includes Uniphar's wholly-owned subsidiary, Uniphar Wholesale Limited ("Uniphar Wholesale"), which is one of the two full-line wholesalers operating in the State and All-phar Services Limited ("Allphar"), which is a pre-wholesale/logistic services provider ("LSP"). Through Uniphar Wholesale, Uniphar purchases POHPPs from manufacturers and re-sells them to community, hospital and veterinary pharmacies.[5] Through Allphar, its wholly-owned subsidiary, Uniphar provides distribution services, including storage, warehousing, logistics, order processing, and product delivery, to pharmaceutical and medical device manufacturers in the State. Allphar's primary function is to deliver products on behalf of manufacturers directly to other wholesalers as well as to community and hospital pharmacies. In some cases, additional services, such as the provision of marketing activities, may be provided by Allphar to manufacturers.

(b) Franchise/symbol groups ("symbol groups")[6]

1.11 In the State, Uniphar, via its subsidiary Allcare Management Services Limited, operates both the *Allcare* symbol group ("Allcare") and the *Life Pharmacy* symbol

[5] Uniphar also sells FOS products and veterinary products to other wholesalers and veterinary surgeons.

[6] The evidence reviewed by the Commission shows no consistent and clear distinction between the services provided by symbol groups and those provided by franchise groups, notwithstanding the fact that Uniphar has different legal agreements with each respective group. Consequently, both symbol and franchise groups will be referred to as symbol groups throughout this Determination.

group ("*Life Pharmacy*")[7]. *Allcare* and *Life Pharmacy* consist of both independent and Uniphar-owned pharmacies. Uniphar owns 98 pharmacies which operate under the *Hickey's*, *Allcare* or *Life Pharmacy* brands. Uniphar has a joint shareholding in one further pharmacy in the State.[8]

(c) Buying groups

1.12 Uniphar also operates two retail pharmacy buying groups, LinkUp and LinkUp Gold. These buying groups negotiate directly with manufacturers for discounts and supply terms for their member pharmacies, which pay monthly membership fees. LinkUp has approximately [redacted] member pharmacies, while LinkUp Gold has approximately [redacted] member pharmacies in the State.

1.13 For the financial year ending 31 December 2020, Uniphar's worldwide turnover was approximately €1.8 billion, of which approximately €1.5 billion was generated in the State.

The Target – NaviCorp

1.14 NaviCorp is a private company limited by shares headquartered and registered in the State under company number 674875.

1.15 NaviCorp specialises in the buying and trading of POHPPs, the provision of IT services to pharmacies, and the provision of retail pharmacy franchise services. NaviCorp operates four primary business divisions: (i) brokerage; (ii) technology; (iii) retail; and, (iv) trading. These business divisions are discussed in further detail below.

[7] *Life Pharmacy* is operated by Independent Life Pharmacy plc ("ILP"), a 50:50 joint venture between Uniphar plc and the pharmacy members. ILP owns the Life Pharmacy trademark and is operated by the board of directors of ILP, a majority of whom are appointed by the pharmacy members. See Uniphar Response to Phase 2 RFI, Q35, p. 7.

[8] Collis Pharmacy Limited, 350 North Circular Road, Phibsboro, Dublin 7.

(i) Brokerage

1.16 NaviCorp's buying group, Axium Buying Group ("Axium"), provides what the Parties term brokerage services to approximately 500 member pharmacies (some of which are members of NaviCorp's symbol groups *StayWell* or *CarePlus*, and some of which are members of Axium only) via NaviCorp's subsidiary, Thera.[9] Axium negotiates discounts and supply terms with pharmaceutical manufacturers, which are made available to Axium members through the Axium buying platform which is discussed further below. Axium members pay a monthly membership fee.

(ii) Technology

1.17 NaviCorp's technology business division consists of several IT platforms such as the Axium buying platform Axium.ie, iGnite, aXel, TouchPlus, and [redacted] iGnite is a business information tool used by pharmacies to analyse their orders and income and make claims from State schemes. aXel is an ordering platform for FOS and OTC products, as well as vitamins, minerals, and supplements. [redacted]

(iii) Retail

1.18 In the State, NaviCorp, via its subsidiary CarePlus Pharmacy Designated Activity Company, operates both the *CarePlus* and *StayWell* symbol groups. *CarePlus*'s [60-70] member pharmacies and *StayWell*'s [20-30] member pharmacies are provided with common management and branding services ("CMB"), among other centrally provided services. *CarePlus* and *StayWell* member pharmacies may also have access to NaviCorp's IT platforms, as listed in paragraph 1.17 above.

(iv) Trading (wholesale)

[9] Merger Notification Form, p. 4.

1.19 NaviCorp has two subsidiaries within its trading business division: Thera and Pembroke Healthcare Limited ("Pembroke"). Pembroke does not have any activities in the State, and will not be discussed further in this Determination. Thera holds an Irish wholesale licence to export and currently exports pharmaceutical products to continental Europe, North Africa and the Middle East. [redacted]

1.20 For the financial year ending 31 December 2020, NaviCorp's worldwide turnover was approximately €[redacted] of which €[redacted] was generated in the State.

Rationale for the Proposed Transaction

1.21 The Parties have stated the following in the Merger Notification Form:

> *"The Target will constitute an investment holding of Uniphar."*[10]

1.22 In response to the Phase 1 RFI served on Uniphar (the "Uniphar Response to Phase 1 RFI") (see paragraph 1.26 below), Uniphar stated the following:

> *"Uniphar believes that the acquisition of NaviGroup will enhance its retail support offering in the market. Uniphar aspires to be the go to solution provider for independent retail pharmacies which want to maintain their independent ownership and autonomy but avail of the suite of services offered by Uniphar.* [redacted]

[10] Merger Notification Form, section 2.7.

[redacted]

[redacted]

[redacted]”[12]

1.23 In Uniphar and NaviCorp’s response to the Commission’s Assessment dated 20 September 2022 (the “Written Response”), the Parties stated that their internal documents:

> “[redacted]”[13]

1.24 The Commission further considers the rationale for the Proposed Transaction in Section 5.

Preliminary Investigation (“Phase 1”)

Contact with the Undertakings Involved

1.25 The Parties submitted a report by Professor Francis O’Toole entitled *“Uniphar’s Proposed Acquisition of Navi Group (including Axium and CarePlus and StayWell*

[11] McKesson Corporation is the former owner of the second full-line wholesaler in the State, UDG Healthcare Limited (“United Drug”). In March 2022 the acquisition of McKesson Corporation’s European operation by PHOENIX Pharma SE (“Phoenix”) was cleared by the European Commission outside of France. The French competition authority cleared the acquisition in September 2022, with commitments. See https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2186 and https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/secteur-de-la-repartition-pharmaceutique-lautorite-autorise-le-rachat-docp. The acquisition of McKesson by Phoenix was formally completed on 31 October 2022, see: PHOENIX group completes largest acquisition in company’s history - PHOENIX Group

[12] Uniphar Response to Phase 1 RFI, Q28.

[13] Written Response, paragraph 8.31.

symbol/franchise groups)" dated 23 December 20201 as an annex to the Merger Notification Form (the "Economics Report").

1.26 On 2 February 2022, the Commission served a Requirement for Further Information ("RFI") on each of Uniphar and NaviCorp pursuant to section 20(2) of the Act (each a "Phase 1 RFI" and together, the "Phase 1 RFIs"). The service of the Phase 1 RFIs adjusted the deadline within which the Commission had to conclude its assessment of the Proposed Transaction in Phase 1.

1.27 Upon receipt of full responses to the Phase 1 RFIs, the *"appropriate date"* (as defined in section 19(6)(b)(i) of the Act) became 10 March 2022.[14]

1.28 During the Phase 1 investigation, the Commission requested and received, on an ongoing basis, further information and clarifications from the Parties.

Third Party Submissions

1.29 During the Phase 1 investigation, the Commission received a submission from one third party in relation to the Proposed Transaction.[15] The submission was fully considered by the Commission insofar as it related to potential competition concerns arising from the Proposed Transaction.

Market Enquiries

1.30 The Commission conducted a number of market enquiries during the Phase 1 investigation and engaged with third parties in relation to its assessment of the competitive effects of the Proposed Transaction.

[14] The "appropriate date" is the date from which the time limits for making both Phase 1 and Phase 2 determinations begin to run.

[15] This third party is referred to in the Commission's file as [redacted]

1.31 During the Phase 1 investigation, the Commission contacted and held calls with various third-party industry stakeholders. Such stakeholders included:

a) Independent retail pharmacies and retail pharmacy chains;[16]

b) the Health Products Regulatory Authority (the "HPRA");

c) the Health Service Executive (the "HSE");

d) the Irish Pharmacy Union (the "IPU");

e) Medicines for Ireland; and,

f) pharmaceutical wholesalers.[17]

The Phase 1 Investigation

1.32 Having considered all the available information in its possession at the time, the Commission was unable to form the view, at the conclusion of its Phase 1 investigation, that the result of the Proposed Transaction would not be to substantially lessen competition in any market for goods or services in the State.

1.33 On 22 April 2022, the Commission determined, in accordance with section 21(2)(b) of the Act, to carry out a full investigation under section 22 of the Act.

Full Investigation ("Phase 2")

Third Party Submissions

1.34 No third-party submissions were received during the Phase 2 investigation.

Market Enquiries

[16] These chains were: Boots Retail (Ireland) Limited ("*Boots*"), Sam McCauley Chemists Limited ("*McCauley*"), and *McCabes* Pharmacy.

[17] These were: United Drug and PCO Manufacturing Limited ("PCO").

1.35 During the Phase 2 investigation, the Commission continued the process initiated during the Phase 1 investigation of seeking the views of and engaging with third parties in relation to the potential competitive effects of the Proposed Transaction. Such stakeholders included:

a) pharmaceutical manufacturers;[18]

b) Pharma Alliance;[19]

c) the Royal College of Surgeons in Ireland ("RCSI");

d) independent pharmacies and retail pharmacy chains[20];

e) United Drug and the legal representatives of Phoenix;

f) [redacted] plc ("[redacted]");

g) Lawlors Pharmaceutical Wholesale Ltd ("Lawlors");

h) the IPU; and,

i) CommCare Pharma Limited ("CommCare").

1.36 During the Phase 2 investigation, the Commission sent a questionnaire to 51 pharmacies in relation to the Proposed Transaction (the "First Pharmacy Questionnaire"). The Commission received responses from 14 of the pharmacies to which it sent the First Pharmacy Questionnaire.

1.37 The Commission also issued a second questionnaire in relation to the Proposed Transaction (the "Second Pharmacy Questionnaire"). The Commission contacted

[18] These were: Accord Healthcare Ireland Limited ("Accord"), Manufacturer X, A. Menarini Pharmaceuticals Ireland Limited ("Menarini"), Pfizer Healthcare Ireland Unlimited Company ("Pfizer"), ROWA Pharmaceuticals Limited ("ROWA"), Sanofi-Aventis Ireland Limited ("Sanofi"), GSK PLC ("GSK") and Viatris Limited ("Viatris").

[19] Pharma Alliance is a collective of CDMG Enterprise Limited, McSharrys Pharmacy Limited, and Mulligans Chemist Limited. For more information, see Pharma Alliance Call Note, dated 14 July 2022, saved as "2022.07.29 CCPC Call with Pharma Alliance _Redacted".

[20] This included: *Pure* Pharmacy.

52 pharmacies and received responses from 21 of the pharmacies to which it sent the Second Pharmacy Questionnaire.

1.38 The Commission held calls with third parties to seek their views on the proposals submitted by the Parties to the Commission on 8 November 2022 (see section 7 below for further details on these proposals).

1.39 During the Phase 2 investigation, the Commission contacted various third parties by email, including competitors of the Parties, customers, regulators, and other industry stakeholders. The Commission also held meetings with a number of those third parties.

Contact with the Undertakings Involved

1.40 On 20 May 2022, the Commission served a Requirement for Further Information on each of Uniphar and NaviCorp pursuant to section 20(2) of the Act (each a "Phase 2 RFI" and together, the "Phase 2 RFIs"). The issuance of the Phase 2 RFIs adjusted the deadline by which the Commission was required to issue its assessment of the Proposed Transaction in Phase 2.

1.41 NaviCorp provided a full response to the Phase 2 RFI on 16 August 2022 (the "NaviCorp Response to Phase 2 RFI").

1.42 Uniphar provided a full response to the Phase 2 RFI on 26 August 2022 (the "Uniphar Response to Phase 2 RFI"), after the date specified by the Commission.

1.43 During the Phase 2 investigation, the Commission requested and received further information and clarifications from the Parties on an ongoing basis.

1.44 Uniphar submitted a second economics report by Professor Francis O'Toole entitled "Uniphar's Proposed Acquisition of Navi Group: Supplementary Economics Report" on 10 August 2022 (the "Supplementary Economics Report").

1.45 The Commission issued its Assessment to the Parties on 21 September 2022 in accordance with its Mergers and Acquisitions Procedures.[21]

1.46 The Parties requested access to the Commission's file. According to the Commission's procedures,[22] parties to whom an Assessment has been addressed are to be given access to the Commission's file upon request, during the 15 working day period following their receipt of the Commission's Assessment. The Commission provided the Parties with a schedule of all of the Parties' documents and all of the third-party documents included in the file on 21 September 2022. Access to the file was therefore granted during the 15 working day period. [23]

1.47 The Parties made a joint Written Response on 12 October 2022 in response to the Commission's Assessment. The Parties' Written Response included an economics report by Frontier Economics ("Frontier Report"). NaviCorp made a confidential submission on the counterfactual ("NaviCorp's Confidential Submission").[24]

1.48 The Parties made a joint oral submission (the "Oral Response") to Commission Members on 18 October 2022.

1.49 The Parties made a joint submission on the efficiencies arising from the Proposed Transaction ("Parties' Submission on Efficiencies") on 24 October 2022.

1.50 Following the Written Response and Oral Response, the Commission undertook additional market enquiries to address several points raised by the Parties in their Written Response and Oral Response. The Parties were given access to all additional information gathered in this regard.

Information Sources Relied Upon

[21] See the Commission's "Mergers and Acquisitions Procedures", dated 31 October 2014 and in particular paragraph 3.8.

[22] See, the Commission's "Access to the File in Merger Cases", dated 31 October 2014, Article 5.1.

[23] Uniphar requested access to third party documents on 23 September 2022. NaviCorp requested access to third party documents on 22 September 2022.

[24] See Annex 5 to the Written Response.

1.51 In forming its conclusions on the Proposed Transaction, as set out in this Determination, the Commission considered all the relevant information available to it at the time of making the Determination including information provided by the Parties in response to the Commission's RFIs and information requests, the economic reports submitted by the Parties, the Written Response, the Oral Response, information obtained from third parties, and other information available in the public domain.

1.52 During the Phase 2 investigation, the Commission also sought expert economic advice and analysis from Dr Christian Koboldt of DotEcon Ltd. Dr Koboldt's advice is incorporated into the Commission's analysis of the Proposed Transaction and, although the Commission benefitted from his expert advice, the Commission alone is responsible for the views expressed in this Determination.

Phase 2 Proposals

1.53 On 3 October 2022, the Parties submitted working draft remedies proposals ("First Draft Proposals") to the Commission. [The submission of these proposals extended the deadline within which the Commission was required to make its determination of the Proposed Transaction in Phase 2. The extension added 15 working days to the Phase 2 period, bringing the review period to a total of 135 working days, in accordance with section 22(4B) of the Act]. On 11 October 2022, the Commission sought clarification from the Parties on a number of points included in the First Draft Proposals, and the Parties responded to the Commission's clarifications on 24 October 2022. The Parties also included a presentation on the First Draft Proposals in their Oral Response to the Commission on 18 October 2022. In a meeting with the Parties on 2 November 2022, the Parties were informed that the First Draft Proposals would not address the SLC concerns identified by the Commission in the Relevant Markets for a number of reasons, including the following: they do not ameliorate the SLC concerns; they are not comprehensive or effective; maintaining the separate entities for two years merely postpones the implementation of the SLC concerns; and the nature of the First Draft Proposals is temporary and time-limited.

1.54 On 8 November 2022, the Parties submitted a second set of working draft remedies proposals ("Second Draft Proposals").

1.55 On 11 November 2022, the Commission sought clarification from the Parties on a number of points included in the Second Draft Proposals, and the Parties responded on 14 November 2022.

1.56 On 12 December 2022, the Parties submitted updated second draft proposals ("Updated Second Draft Proposals").

1.57 On 14 December 2022, the Parties submitted a further set of draft proposals (the "Third Draft Proposals").

Overview of the Legislative Framework and Relevant Case Law/ Guidelines

Introduction

1.58 The legislative framework within which the Commission conducts its review of mergers notified pursuant to section 18 of the Act is set out below and includes a summary of relevant guidelines published by the Commission and relevant case law. All statutory references in this section are to the Act, unless otherwise stated.

Legislative Framework

1.59 When a merger or acquisition within the meaning of section 16 is notified to the Commission pursuant to section 18 (the "Notified Transaction") the Commission is required to assess the impact that the Notified Transaction will have on competition in the State, pursuant to section 20. The applicable legal test at that stage is set out in section 20(1)(c) which provides that the Commission:

"shall form a view as to whether the result of the merger or acquisition would be to substantially lessen competition in markets for goods or services in the State."

1.60 Following notification, the Commission has 30 working days after the appropriate date within which to decide whether it can clear a Notified Transaction without having to carry out a full investigation under section 22, known as a "Phase 2 Investigation".[25] This decision is taken on the basis of the evidence available to it, including the submissions of the parties to the Notified Transaction and third parties.[26] A Phase 2 Investigation is opened under section 22[27] if the Commission has been unable, on the basis of the information before it, to form the view that the result of the Notified Transaction will not be to substantially lessen competition in in markets for goods or services in the State.

1.61 Where the Commission has initiated a Phase 2 Investigation, it must make a determination within 120 working days of the appropriate date.[28] Upon completion of a Phase 2 Investigation, the Commission must make a determination that the merger may be:

"(a) put into effect;

(b) may not be put into effect; or

(c) may be put into effect subject to conditions specified by it being complied with,

[25] The appropriate date may be reset pursuant to section 19(6)(b); and it may be extended pursuant to section 21(4).

[26] Section 21(2)(a) of the Act and paragraph 2.11 of the Mergers and Acquisitions Procedures.

[27] Section 21(2)(b) of the Act and paragraph 3.1 of the Mergers and Acquisitions Procedures.

[28] The term "appropriate date" is defined in section 19 of the Act. Section 22(4A) of the Act suspends the 120 working day timeframe referred to in section 22 where the Commission has issued a requirement to provide information pursuant to section 20(2) of the Act. Section 22(4B) provides that the Commission shall furnish a copy of the written determination to the notifying parties within 135 working days after the appropriate date where the notifying parties submit proposals to the Commission in accordance with section 20(3) of the Act.

on the ground that the result of the merger or acquisition will or will not, as the case may be, be to substantially lessen competition in markets for goods or services in the State, or, as appropriate, will not be to substantially lessen such competition if conditions so specified are complied with." (emphasis added)

The Commission's approach to the SLC test

1.62 Under the Act, the Oireachtas has entrusted to the Commission the task of investigating competition issues raised by Notified Transactions. The Act imposes on the Commission a duty to act, but has set the terms upon which the Commission must act in such a way as to afford the Commission a wide latitude in its assessment of the competition issues upon which it is required to report as well as in relation to the remedial decisions it must take.

1.63 Each stage in the Commission's decision-making process (i.e., whether there is a merger or acquisition within the meaning of section 16; whether the merger will or will not result in a substantial lessening of competition ("SLC") under section 22(3); and what remedies will ameliorate any effects of the merger on competition in markets for goods or services under section 20) necessarily involves a predictive exercise and involves an important element of judgement. Thus, in carrying out its duties to assess whether there is a merger, to identify any SLC and to remedy it, the Commission has a wide margin of appreciation.

1.64 In this regard, the Commission refers to the judgment of Cooke J in *Rye Investments Ltd. V Competition Authority* who held:

> *"…where the Authority has, without committing significant error, exercised its specialist expertise in making judgments as to the prospective consequences of the economic and commercial factors which govern or influence competition in the relevant market, this Court should not intervene even if it is demonstrated that an opposite conclusion might plausibly have been reached by placing weight on different aspects of the*

available evidence or data or by attributing different or greater significance to other pertinent factors in the economic assessment."

…

"Accordingly, the Court considers that even if it might be said that the Authority is taking the most favourable view of the information at its disposal, the Court does not consider that it has gone beyond the margin of judgment which it is accorded in such matters and has not committed any obvious or significant error of assessment in respect of the material before it."[29]

1.65 The Commission considers that, in the test set out in section 22(3) quoted above, the relevant standard of proof is the ordinary civil standard, i.e., the balance of probabilities. In other words, in order to decide whether the result of the merger or acquisition will (or will not) be an SLC, the Commission must decide that an SLC is more likely than not to occur.

1.66 The application of the balance of probabilities (or more likely than not) test is also recognised in the Commission's Guidelines on Merger Analysis: for example, paragraph 1.16 explains that in applying the SLC test, the Commission investigates the *likely* effect of a merger not only by reference to current competitors, but also by reference to potential competitors. Similarly, paragraph 1.19 provides that the Commission requires sufficient reliable evidence from the merging parties regarding the *likely* competitive effects of the merger.

1.67 Furthermore, it is important to recognise that the concept of a standard of proof provides a framework within which, for example, the Commission conducts its assessment of the likely effects of a merger. Such an assessment is, however, a

[29] Paragraphs 5.21 and 8.21 of *Rye Investments Ltd. V Competition Authority* [2009] IEHC 140 ("Rye Investments").

matter of judgement and evaluation and an unduly technical or rigid approach to the application of the standard of proof is not of particular assistance.

1.68 Where the range of ways in which an SLC could be made manifest is wide and, indeed, necessarily unpredictable, the Commission's assessment must be carried out in the round by looking at all the relevant factual material, including the incentives which those involved might have to act to reduce competition, and then making an overall assessment of the likelihood of the merger resulting in an SLC.

1.69 Accordingly, any Commission finding in relation to the presence or absence of an SLC will be based on all available information to the Commission considered in light of all credible theories of consumer harm arising from possible adverse competition effects.[30]

1.70 As set out in the remainder of this determination, the Commission has in mind the relevant civil standard in considering the statutory question of whether the result of the merger will be an SLC, and it applies that standard in reaching a judgement as to the likelihood of possible outcomes. While the Commission may use quantitative measures to assist in analysing whether a merger is likely to result in an SLC, the Commission will assess each merger on its merits. Paragraph 1.8 of the Merger Guidelines states as follows:

> *"While certain quantitative measures can be used to assist in analysing whether a merger is likely to result in an SLC there are no standard measures of competitive effects that can determine definitively, on their own, whether a given merger is likely to have such an effect. Each proposed merger needs to be assessed on its merits and in its own particular circumstances."*

1.71 Paragraph 1.9 of the Merger Guidelines goes on to make the important point that, in applying the SLC test, the Commission analyses not only the effect on the price

[30] See paragraph 1.7 of the Merger Guidelines.

of affected products but also other effects that can impact on consumers, such as changes to output (quantity), quality, consumer choice and innovation (e.g., development of new products or enhancements to existing products).

1.72 Chapters 2 to 9 of the Merger Guidelines set out the Commission's approach to the key elements of merger review function, such as market definition, horizontal merger effects, barriers to entry and expansion, countervailing buyer power, efficiencies and failing firm arguments. The remainder of this determination will summarise the applicable principles which the Commission considers relevant to its analysis of the Proposed Transaction.

Commission's View on the Position of the Parties

1.73 The Written Response sets out at length the positions of the Parties in relation to the evidence obtained by the Commission during the course of its review of the Proposed Transaction and the respective weight placed on this evidence by the Commission. In outline, the Parties contend that the Commission has not taken into account all available information and that the Commission has placed undue reliance on quantitative analytical measures.[31] The particular points raised by the Parties are dealt with below. There is, however, a general point to be made in relation to the wide margin of discretion afforded to the Commission when considering the evidence available to it, which is recognised both in the Irish and EU courts.[32] The relevant standard is set out in the judgment of Cooke J in *Rye Investments*:

> *"in a case such as the present, where primary findings of fact have not been put in issue, the Court considers that a determination by the Authority that a merger or acquisition will result in a substantial lessening of competition ought not to be set aside by this Court unless:-*

[31] Written Response, paragraph 3.3.

[32] See paragraph 5.18 of *Rye Investments*, cited above and Case T-5/02 *Tetra Laval v Commission*, upheld on appeal by the Court of Justice in Case C-12/03P *Commission v Tetra Laval.*

(a) The Authority is shown to have committed a serious error in drawing inferences or conclusions from facts, such that the inferences or conclusions become untenable or unsound by reason of the error having been made; or

(b) It is demonstrated that the Authority has failed to take into consideration or adequately to consider, relevant information or data such that an inference or conclusion material to the determination is unsupported by or is rendered inconsistent with the clear force and effect of the available evidence taken as a whole; or

(c) A significant appraisal of economic or technical factors material to the functioning of competition in the relevant market is shown to be so inconsistent with the available evidence as to be manifestly unreasonable and unsound; or

(d) The Authority's statement of its reasons for reaching conclusions material to the basis of the determination is lacking in cogency or coherence or is contradicted by the evidence which was available to it; or

(e) The Authority has made a material error of law either in the construction and application of the Act or by otherwise infringing some applicable principle of constitutional or natural justice."[33]

1.74 The question of materiality of evidence is therefore of central importance. Minor errors or areas of reasonable disagreement will not vitiate the Commission's assessment of a Notified Transaction. The Commission must have regard to all relevant considerations and disregard any irrelevant considerations, however the

[33] See paragraphs 5.20 of *Rye Investments* cited above.

weight to be given to those relevant considerations is a matter for the Commission.

1.75 The Written Response also sets out a number of procedural concerns including what the Parties refer to as the Commission's use of leading questions.[34] The Commission does not agree with the Parties' characterisation of these questions. In any event, the Commission is not precluded from asking questions in this way provided that it is eliciting genuine and comprehensive responses. Given the highly technical nature of merger review, the Commission is necessarily required to ask precise and direct questions in order to obtain any available relevant evidence. As discussed above, the Commission is afforded a wide margin of discretion in the manner in which it gathers evidence.[35]

1.76 The Parties contend that *"the lack of third party submissions is in itself evidence that the Proposed Transaction does not raise concern that the Commission must take into account."*[36] The Commission does not agree that the lack of voluntary submissions from retail pharmacies, or other third parties, can support an inference that there is no competition issues with the Proposed Transaction. While it would be preferable if pharmacies had engaged to a greater extent with the Commission, the Commission's review of a Notified Transaction cannot depend on the awareness of competition concerns among third parties in the relevant sector.

1.77 Finally, the Written Response states that the "*Commission's lack of feedback has prejudiced the Parties*".[37] However, as acknowledged by the Parties, there is no express statutory obligation on the Commission to provide feedback prior to the issue of a written Assessment.[38] Further, the Parties were provided with the

[34] Written Response, paragraphs 4.5 – 4.10.

[35] See paragraph 5.19 of *Rye Investments*, cited above and Case T-5/02 *Tetra Laval v Commission*, upheld on appeal by the Court of Justice in Case C-12/03P *Commission v Tetra Laval.*

[36] Written Response, paragraph 4.38.

[37] Written Response, paragraph 4.

[38] Written Response, paragraph 4.2.

Assessment which set out in full the Commission's preliminary competition concerns and the Commission upheld the Parties' rights of representation/defence in providing the Parties the opportunity to submit the Written Response and to make an Oral Response.

1.78 The Commission has engaged and responded to the Parties very promptly at all stages of the review of the Proposed Transaction. In particular, pursuant to subsection 20(3) of the Act, it was the prerogative of the Parties, in conjunction with their respective legal advisors, to enter into discussions with the Commission with a view to identifying measures which would ameliorate the effects of the Proposed Transaction on competition in any relevant market. The Parties could have entered into these discussions at any time from the date of notification (i.e., 24 December 2021). However, the Parties first enquired about the possibility to enter into proposal discussions only on 15 September 2022 which was very close to the date of issuing the Assessment, thus limiting the timeframe for such discussions to identify measures which would ameliorate any competition effects of the Proposed Transaction.

2. INDUSTRY BACKGROUND

Introduction

2.1 The Proposed Transaction will involve Uniphar's acquisition of NaviCorp. As noted in Section 1 above, NaviCorp's business activities include the provision of brokerage services (i.e., buying group services) to members of NaviCorp's buying group (Axium) and symbol groups (*StayWell* and *CarePlus*); and CMB services provided to members of the symbol groups.

2.2 The purpose of this Section is to provide context for the identification of relevant product markets and for an assessment of the likely competitive effects of the Proposed Transaction set out later in the Determination. The industry background begins by describing the types of pharmaceutical products supplied in the State. It maps out the routes to market, explaining how pharmaceutical products get from the manufacturer to the retail pharmacy and then to the end-customer. The industry background then describes the roles played by buying groups and symbol groups.

2.3 The content of the industry background section therefore covers the following:

a) The types of pharmaceutical products that are supplied in the State;

b) The routes to market for pharmaceutical products in the State;

c) The role of buying groups; and

d) The role of symbol groups.

(a) Types of pharmaceutical products that are supplied in the State

Categories of product

2.4 Pharmaceutical products sold in the State can be classified as either (i) POHPPs or (ii) non-pharmacy-only products. POHPPs are those products that are only available to consumers under the supervision of a pharmacist, and include both prescription products as well as certain OTC products (i.e., OTC products which can only be dispensed under the supervision of a pharmacist). Non-pharmacy-only products include OTC products that can be sold at any retail outlet (such as paracetamol) and FOS products.[39] For the purposes of this industry background, and considering the activities of the Parties, the focus is on the supply of POHPPs.[40]

2.5 POHPPs can be classified as either patented or generic. Patented POHPPs[41] are sold exclusively by a single manufacturer and, for the duration of the patent, cannot be supplied by other manufacturers in the State.[42] Generic POHPPs contain the same active ingredient(s) as the original patented product and can be supplied by multiple manufacturers.[43]

Pricing of POHPPs

2.6 The State is the largest purchaser of POHPPs. According to most estimates, approximately 80% of POHPPs are ultimately paid for by the State.[44] Consequently, the pricing of POHPPs largely centres around the price the State agrees to pay for a given POHPP, which is known as the reimbursement price. The pricing of POHPPs is regulated at each level of the supply chain.

2.7 For POHPPs on the Reimbursement List,[45] the State sets the maximum price manufacturers can charge. This maximum price is called the 'ex-factory price'.

[39] FOS products include beauty products, cosmetics, etc.

[40] From the Supplementary Economics Report, p 13: *"Within the context of OTC products, both Pharmacy-only OTC and otherwise (as well as FOS products), manufacturers do not tend to agree discounts with the buying groups but do appear to agree significant promotional packages (including discounts) directly with symbols, retail chains and even individual pharmacies".*

[41] Patented POHPPs can also referred to as 'branded' or 'reference' products.

[42] While manufacturers are unable to supply patented pharmaceutical products for which they do not hold the patent in the State, the importation and supply of patented pharmaceutical products is permitted. Such supply is often undertaken by parallel importers.

[43] For the definition of generic medicine, see Article 10(2)(b) of *Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use*.

[44] Doyle-Rossi, M. & Gallagher M. "Ireland", in Castle, G. (2020). *Pricing and Reimbursement,* Global Legal Insights, p. 126. Also see Supplementary Economics Report, p. 4.

[45] As provided for in section 17 of the Health (Pricing and Supply of Medical Goods) Act 2013, the HSE maintains the Reimbursement List.

While the ex-factory price establishes the maximum price a manufacturer can charge, in practice manufacturers offer discounts, particularly on generic POHPPs and those which may be competing with parallel imports. These discounts are off the so-called 'trade price'. The trade price is not regulated and is decided upon by market participants. As pharmacies source most of their products from wholesalers, manufacturers offer discounts off the 'trade price' that is listed on the wholesaler's invoice to the respective pharmacy.

(b) Routes to market for POHPPs

2.8 Before considering the role played by buying groups and symbol groups which is, due to the overlap in the activities of the Parties, a focus of the Proposed Transaction, the Commission considers that it is important to set out the context within which these groups operate. This section describes the types of retail pharmacies from which customers purchase POHPPs, before considering the different ways in which pharmacies can source POHPPS.[46]

Retail pharmacies

2.9 There are two types of pharmacies active in the State: retail pharmacies and hospital pharmacies.[47] According to the Pharmaceutical Society of Ireland ("PSI"), there were 1,905 retail pharmacies in the State as of July 2022.[48] Approximately 45% of retail pharmacies are located in city or urban areas, with the remainder located in towns, villages and rural areas.[49] Ireland has one of the lowest

[46] See Figure 3 below for an overview of the different ways pharmacies can source POHPPs.

[47] Hospital pharmacies source pharmaceutical products through a different route to market then retail pharmacies. They are not members of buying groups or symbol groups and so are not addressed in further detail in this Determination.

[48] Pharmaceutical Society of Ireland. (2022). "Pharmacy Statistics: A summary of the pharmacy register", available at Pharmacies - Website Statistics.sflb.ashx (thepsi.ie). Retail pharmacies may also be known as community pharmacies, Uniphar's Response the Commission's informal questions, Q13, dated 3 May 2022.

[49] IPU (2021). *Annual Review of Community Pharmacy in Ireland 2020,* p. 5.

population per pharmacy figures in the world,[50] with there being 2,400 residents per pharmacy in the State, in comparison to 2,900 in France, 4,000 in Germany, 3,300 in Italy and 4,500 in the UK.[51] Pharmacies dispense POHPPs, OTC and FOS products, and provide advice and counselling. Pharmacies also played a role in the State's COVID-19 vaccination campaign.

Types of pharmacies

2.10 Retail pharmacies may be independently owned, or may be owned by a retail chain. Approximately 1,450 pharmacies are independent pharmacies, making independents the primary pharmacy ownership structure in the State. An independent pharmacy may share common branding with other pharmacies as part of a symbol group,[52] but the independent pharmacy is not owned by the group, and remains legally independent. When independent pharmacies which are part of a symbol group are excluded, there are approximately 1,100 independent pharmacies in the State. Retail pharmacy chains are pharmacies which are owned by a corporate group. Examples of such retail pharmacy chains are *Boots*, *McCauley's*, *Hickey's and Lloyds*. Retail pharmacy chains are described by the Parties as common-ownership groups,[53] consisting of a group of pharmacies under common ownership.[54] Approximately 450 pharmacies in the State are part of retail pharmacy chains or common-ownership groups.

Pharmacy products and services

[50] Henman, Martin C. (2020). "Primary Health Care and Community Pharmacy in Ireland: a lot of visions but little progress", *International Series: Integration of community pharmacy in primary health care,* Vol. 1, No. 4, p. 3.

[51] IPU (2021). *Annual Review of Community Pharmacy in Ireland 2020,* p. 14.

[52] Examples include Uniphar's *Allcare* and *Life Pharmacy* brands, and NaviCorp's *CarePlus* and *StayWell* brands.

[53] The terms "retail pharmacy chain" and "common-ownership group" should be construed as having the same meaning in this Determination.

[54] Pharmacies which are part of a common-ownership group may or may not trade under a common brand name.

2.11 The majority of POHPPs dispensed by retail pharmacies were dispensed under one of the various State schemes.[55] In 2020, 75% of such products were dispensed under the General Medical Service ("GMS") and 11% under the Long-Term Illness scheme ("LTI").[56] The IPU and KPMG estimated that in 2020 17 million items, of a total of 98 million items (17%), were dispensed to private customers, and therefore at prices the pharmacies are free to set themselves.[57] The price of POHPPs sold to private customers is not regulated.

Pharmacy fees and pricing

2.12 The pharmacy sector generated a total revenue of €3 billion in 2020.[58] A NaviCorp internal presentation noted that prescription medicines make up [redacted]% of overall pharmacy sales,[59] with the IPU and KPMG also finding that POHPPs comprise the vast majority of pharmacy sales.[60] Dispensing to public patients under one of the State's reimbursement schemes represents the majority of pharmacy revenue, followed by OTC and FOS sales and private prescription dispensing, as illustrated in Figures 1 and 2 below:

[55] These schemes are outlined at paragraph 2.71 below.

[56] IPU (2021). *Annual Review of Community Pharmacy in Ireland 2020,* p. 20.

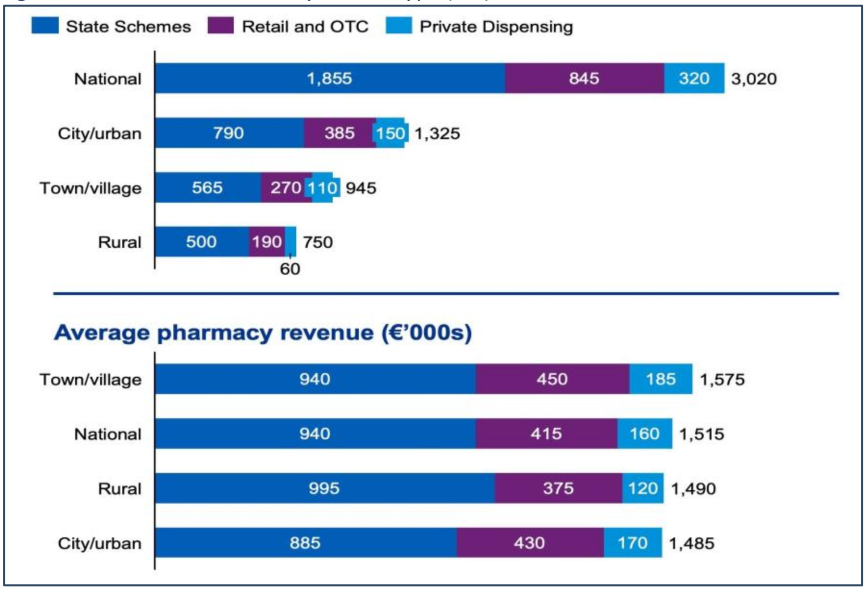
[57] IPU (2021). *Annual Review of Community Pharmacy in Ireland 2020,* p. 20.

[58] IPU (2021). *Annual Review of Community Pharmacy in Ireland 2020,* p. 27.

[59] NaviCorp document, "*Irish-Pharmacy-Sector-and-Navi-16Mar21.pptx",* dated 16 March 2021, p. 4, NaviCorp Response to Phase 1 RFI.

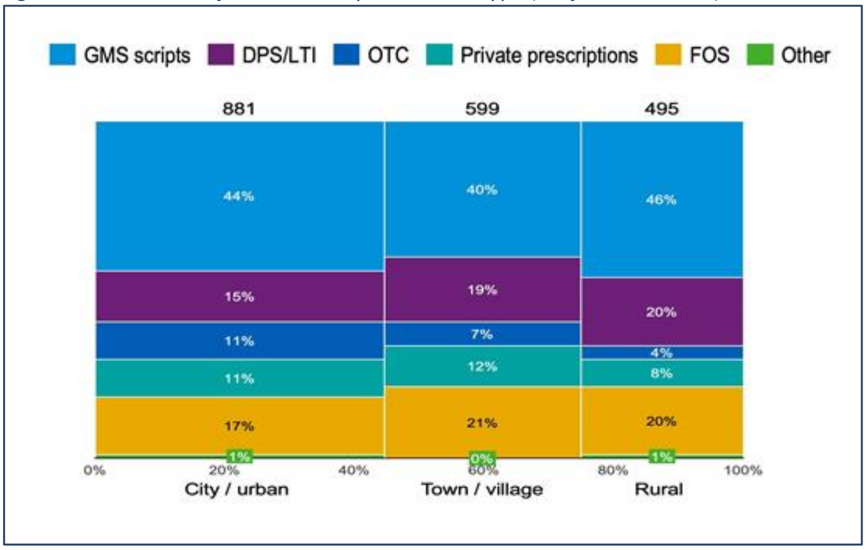
[60] IPU (2021). *Annual Review of Community Pharmacy in Ireland 2020,* p. 27.

Figure 1: Total sector revenue by income type (€m).



Source: IPU.[61]

Figure 2: Breakdown of all revenue by settlement type (% of total revenue).[62]



Source: IPU.[63]

[61] IPU (2021). *Annual Review of Community Pharmacy in Ireland 2020,* p. 27.

[62] As demonstrated in Figure 2, the GMS accounts for the largest percentage of revenue by settlement type.

[63] IPU (2021). *Annual Review of Community Pharmacy in Ireland 2020,* p. 29.

2.13 Pharmacies received net payments of €421 million in 2020[64] through the State's reimbursement schemes.[65] An estimated €228 million is spent annually on private prescriptions.[66]

Retail pharmacy market trends

2.14 While the majority of pharmacies remain independent, market consolidation is a growing trend,[67] and large retail pharmacy chains and full-line wholesalers are increasing their presence in the State.[68] Within the context of recent and on-going developments in the Irish retail pharmacy sector the Supplementary Economics Report stated how:

> *"[t]here has been a significant evolution away from the standalone 'independent' community pharmacy (and associated pharmacist) and a move towards group retailers (i.e. common ownership retail groups) and the symbol/franchise in Ireland, apparently following the evolution of the retail grocery market".*[69]

2.15 Between 68% of new pharmacy openings in the State between 2020 and November 2022 related to changes in ownership, as opposed to new so-called 'green-field openings'.[70] The following factors have been cited as reasons driving this consolidation: recruitment challenges,[71] lack of debt financing options,[72]

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[64] Inclusive of Hi-Tech patient care fees, see IPU (2021). *Annual Review of Community Pharmacy in Ireland 2020*.

[65] IPU (2021). *Annual Review of Community Pharmacy in Ireland 2020*, p. 20.

[66] Coates, Hilary. (2020). *Bank of Ireland: Sector Insights & Outlook,* Bank of Ireland, p. 16, available here.

[67] Coates, Hilary. (2020). *Bank of Ireland: Sector Insights & Outlook,* Bank of Ireland, p. 16, available here, and Irish Times. (2020). "Consolidation on the cards as retail pharmacy feels squeeze", 3 September 2020, available here.

[68] IPU (2021). *Annual Review of Community Pharmacy in Ireland 2020,* p. 46.

[69] Supplementary Economics Report, p.15.

[70] Pharmaceutical Society of Ireland. (2022). "Pharmacy Statistics: A summary of the pharmacy register", available at Pharmacies - Website Statistics.sflb.ashx (thepsi.ie).

[71] McEntee, Tony. (2018). "REI Pharmacy Meeting Presentation", *McCauley,* p. 9.

[72] McEntee, Tony. (2018). "REI Pharmacy Meeting Presentation", *McCauley,* p. 2.

increased regulatory requirements,[73] the benefits of group/chain resources,[74] and increased operating costs.[75]

2.16 Acquisitions of retail pharmacies by Uniphar and United Drug are examples of this trend, with Uniphar acquiring the *Hickey's* chain,[76] a number of other pharmacies,[77] and the *Allcare* symbol group in recent years.[78] Uniphar are also proposing to acquire *McCauley*, a retail pharmacy chain of 37 pharmacies.[79] United Drug acquired the *Lloyds* retail chain in 2014, before adding several smaller chains to *Lloyds* following its acquisition.[80] Commenting on growing consolidation in the sector, Daragh Connolly, former chair of *Haven*, explained the rationale behind the merger of *Haven* and *totalhealth*:

> *"There are now just two main wholesalers in the market, United Drug and Uniphar, and we have good relationships with both of them. But what we do see is further consolidation happening with Uniphar, for example, buying the Hickeys Pharmacy chain. What we don't want to end up with is a situation where there is an oligopoly where we could be left behind and at the mercy of big international players".*[81]

Routes from the manufacturer to the retail pharmacy

2.17 Figure 3 below illustrates the POHPPs supply chain in the State. In summary, manufacturers of POHPPS make drugs available through different types of

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[73] McEntee, Tony. (2018). "REI Pharmacy Meeting Presentation", *McCauley*, p. 12.

[74] McEntee, Tony. (2018). "REI Pharmacy Meeting Presentation", *McCauley*, p. 12.

[75] Irish Times. (2020). "Consolidation on the cards as retail pharmacy feels squeeze", 3 September 2020, available here.

[76] See the Commission's Determination in *M/20/027 – Uniphar/Hickeys*, available here.

[77] See the Commission's Determinations in *M/15/076 - Uniphar/Lindchem*; M/16/015 – *Uniphar/Riverchem*; *M/18/085 – Uniphar/Bradley's Pharmacy Group*; and *M/18/097 – Uniphar/Certain pharmacy businesses of Inischem DAC*.

[78] See the Commission's Determination in *M/15/027 – Uniphar/Allcare*, accessible here.

[79] The Commission received a notification this acquisition on 19 September 2022, see M/22/049 - Uniphar/LXW Remedies (McCauley) here.

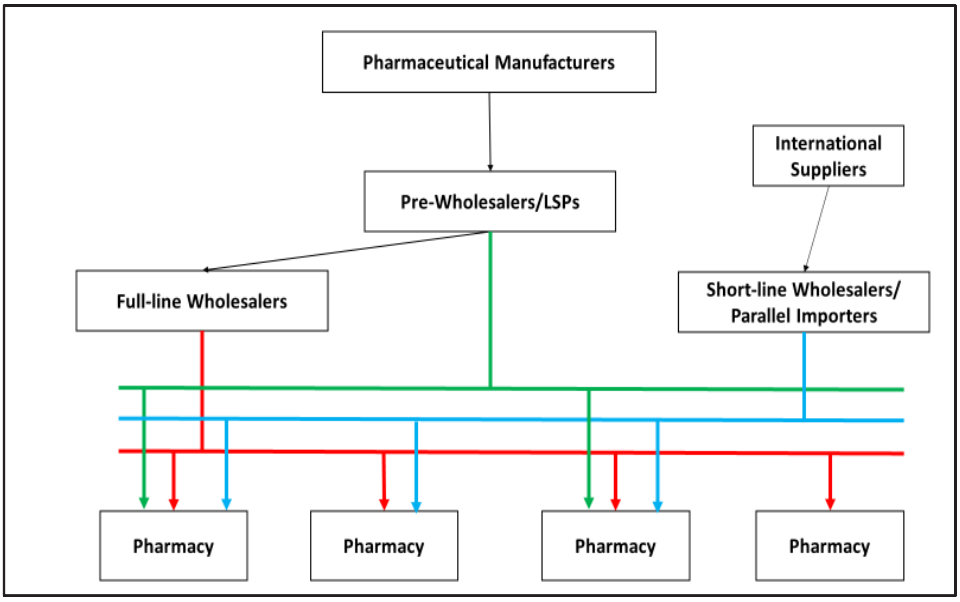
[80] See the Commission's Determinations in *M/15/21 – Lloyds Pharmacy/Walsh's and Friary Allcare Pharmacies*; *M/18/024 Lloyds Pharmacy/ McSweeney Group*, and *M/19/019 Lloyds Median BOFH*.

[81] Irish Independent. (2021). "Ireland's two largest local pharmacy groups to merge", 18 April 2021, available here.

wholesaler. Most POHPPs are supplied to retail pharmacies via a full-line wholesaler. A retail pharmacy may engage directly with the manufacturer, or with a wholesaler. These relationships are depicted in Figure 3 and are described in more detail below.

2.18 As shown in Figure 3, retail pharmacies source POHPPs through three primary routes: (a) full-line wholesaler to pharmacy; (b) short-line wholesaler to pharmacy; and (c) directly from manufacturer to pharmacy ("direct-to-pharmacy").

Figure 3: Routes from the manufacturer to the retail pharmacy



Source: The Commission

a) *Full-line wholesaler to pharmacy*: Full-line wholesalers stock an extensive range of products, which amounts to a minimum of 10,000-12,000 distinct items or stock keeping units ("SKUs").[82] Retail pharmacies will typically source the vast majority of their POHPPs from one full-line wholesaler, referred to as their primary full-line wholesaler. Retail pharmacies order

[82] A SKU refers to a number or code which identifies each product or item for sale. See Oral Submission Transcript, 18 October 2022, p. 27, line 22.

from full-line wholesalers electronically. Full-line wholesalers typically deliver products to retail pharmacies through twice-daily deliveries on weekdays and through a single delivery on Saturdays. Retail pharmacies will place orders with the other full-line wholesaler when there are supply issues with their primary full-line wholesaler.[83] The vast majority of POHPPs sold in the State are supplied to pharmacies by full-line wholesalers, of which there are two in the State: Uniphar and United Drug. The total value of POHPP sales to pharmacies by full-line wholesalers was valued at approximately €2.1 billion in 2021.[84] In 2021, Uniphar and United Drug accounted for approximately 87% of the total value of POHPPs sales to pharmacies in the State.[85]

A retail pharmacy may purchase POHPPs directly from a full-line wholesaler. In this case, the retail pharmacy negotiates directly with the full-line wholesaler.[86] The Commission understands that approximately 33% of the POHPPs supplied by full-line wholesalers in the State are subject to pharmacy-full-line wholesaler direct negotiation.[87]

Alternatively, the retail pharmacy will purchase POHPPs from the full-line wholesaler, but the price will be set indirectly. The retail pharmacy will either engage directly with the respective manufacturer to agree a price

[83] Gorecki, P.K. et al. (2012), *Delivery of Pharmaceuticals in Ireland: Getting a Bigger Bang for the Buck*, Economic and Social Research Institute, Research Series, No. 24, p. 100.

[84] Uniphar document "*Project Lima CCPC Presentation*", dated 4 May 2022, provided to the Commission on 4 May 2022, p. 14.

[85] Uniphar document "*Project Lima CCPC Presentation*", dated 4 May 2022, provided to the Commission on 4 May 2022, p. 14. United Drug provided data [redacted] see United Drug Response to Information Request, Q2, saved as "2022.08.22 CCPC 01.07.22- 22.08.22 Non-confidential_Redacted".

[86] The price charged by the wholesaler is subject to pricing regulations.

[87] As noted below, Uniphar estimates that 67% of the POHPPs that are supplied by full-line wholesalers in the State are subject to either pharmacy-manufacturer price negotiation or buying group-manufacturer price negotiation. Consequently, the Commission understands that the remaining 33% of products supplied by full-line wholesalers are subject to pharmacy-full-line wholesaler price negotiation.

or part of the price (such as a manufacturer-funded discount), or the price will be negotiated by a buying group[88] which will engage with manufacturers on behalf of its member retail pharmacies. The agreed price will then be communicated to the relevant full-line wholesaler. When this occurs, the product will still be supplied through, and purchased from, the full-line wholesaler, but the price (or part of the price) will have been negotiated between the retail pharmacy directly with the manufacturer, or via buying group-manufacturer negotiation.[89] Depending on whether the POHPPs supplied is branded or generic, the full-line wholesaler will receive a rebate from the manufacturer to reflect the lower price.

Uniphar estimates that approximately 22% of all POHPPs supplied via full-line wholesalers are subject to pharmacy-manufacturer price negotiation.[90] Uniphar also estimates that approximately 45% of the POHPPs supplied by full-line wholesalers in the State are subject to buying group-manufacturer price negotiation.[91]

b) *Short-line wholesalers/parallel importers:* The Parties deal with short-line wholesalers and parallel importers synonymously. Short-line wholesalers/parallel importers supply a substantially smaller range of POHPPs than full-line wholesalers, usually between 100 to 500 SKUs.[92] Short-line wholesalers also deliver POHPPs to retail pharmacies less frequently than full-line wholesalers. Short-line wholesalers tend to

[88] Buying groups are described in detail in paragraphs 2.30-2.40 below.

[89] Written Response, paragraph 5.10.

[90] Parties Response to Commission Questions, dated 9 November 2022, Q1.a.

[91] Parties Response to Commission Questions, dated 9 November 2022, Q1.b.

[92] Gorecki, P.K. et al. (2012), *Delivery of Pharmaceuticals in Ireland: Getting a Bigger Bang for the Buck*, Economic and Social Research Institute, Research Series, No. 24, p. 85.

supply particular types of products, namely high-value and repeat-use products.[93] Certain short-line wholesalers, known as parallel importers, source POHPPs at lower prices from other EU member states before supplying them to pharmacies in the State. Such POHPPs are referred to as 'parallel imports'. Uniphar estimates that approximately 98% of short-line wholesalers/parallel importers' products are distributed via short-line wholesaler/parallel importers' own distribution systems.[94] Short-line wholesalers represented 8% of the supply of POHPPs to pharmacies from 2019 through to 2021.[95] There are five short-line wholesalers active in the supply of POHPPs to pharmacies in the State: PCO, iMed, Lexon, Abacus and RxSource. The total value of POHPP sales to retail pharmacies by short-line wholesalers was valued at approximately €186 million in 2021.[96]

c) *Direct-to-pharmacy:* Retail pharmacies are also able to source certain POHPPs directly from manufacturers. When purchased directly from the manufacturer, POHPPs can be delivered to retail pharmacies either by logistic service providers ("LSPs"), pre-wholesalers or the manufacturer's own delivery service. Hospital pharmacies typically source POHPPs directly from manufacturers through this route,[97] owing to specific

[93] PCO Call Note, dated 7 April 2022, p. 1, saved as "2022.04.07 Call Note CCPC – PCO". The Commission understands, on the basis of its call with PCO, that repeat-use products are products which can be dispensed under the same prescription more than once. See the Medicinal Products (Prescription and Control of Supply) Regulations 2003, as amended, for the definition of a repeat prescription.

[94] The Parties Response to the Commission's Questions, dated 9 November 2022, Q4(b). PCO, a short-line wholesalers/parallel importer in the State, operates its own distribution infrastructure. See PCO Call Note, dated 7 April 2022, p. 1, saved as "2022.04.07 Call Note CCPC – PCO".

[95] Uniphar document "*Project Lima CCPC Presentation*", dated 4 May 2022, provided to the Commission on 4 May 2022, p. 14. Also see Uniphar Response Phase 1 RFI, Q37.

[96] Uniphar document "*Project Lima CCPC Presentation*", dated 4 May 2022, provided to the Commission on 4 May 2022, p. 14. Also see Uniphar's Response to Phase 1 RFI, Q3.

[97] Gorecki, P.K. et al. (2012), *Delivery of Pharmaceuticals in Ireland: Getting a Bigger Bang for the Buck*, Economic and Social Research Institute, Research Series, No. 24, p. 26.

discounting models applied to hospital purchases.[98] In 2021, direct supply by manufacturers to retail pharmacies represented just over 5% of the total value of POHPPs sales to pharmacies in the State.[99]

2.19 There is overlap in the services provided by pre-wholesalers and LSPs, as both provide similar services, and pre-wholesalers often sub-contract their distribution activities to LSPs.[100]As shown in Figure 3 above, manufacturers use pre-wholesalers and LSPs to distribute POHPPs on their behalf to full-line wholesalers in the State, and a pre-wholesaler/LSP may also be used to distribute POHPPs direct to pharmacy.[101] Pre-wholesalers provide storage, distribution and logistics services to manufacturers. Manufacturers pay pre-wholesalers for their services. Currently, Allphar and United Drug Distributors, which are owned by Uniphar and United Drug respectively, are the only pre-wholesalers active in the State. Uniphar values the addressable pre-wholesale market at €2 billion.[102] LSPs also provide distribution and logistics services to manufacturers and wholesalers in the State. DHL and Alltrans are two LSPs active in the State.

(c) The role of buying groups

2.20 Having set out the supply chain involved in getting POHPPs from the manufacturer to the retail customer, the Commission now examines the role of intermediaries including buying groups and symbol groups. Both these types of group are located in the supply chain between the retail pharmacy and the full- or short-line

[98] Uniphar document "*Route to Market,*" dated 7 February 2022, Uniphar Response to Phase 1 RFI. Uniphar notes that when a hospital pharmacy purchases in excess of €635 from one manufacturer's portfolio a 15% discount is applied. Consequently, hospital pharmacies are not addressed in further detail in this Assessment.

[99] Uniphar document "*Project Lima CCPC Presentation*", dated 4 May 2022, provided to the Commission on 4 May 2022, p. 14. United Drug provided data which [redacted] see United Drug Response to Information Request, Q2, saved as "2022.08.22 CCPC 01.07.22- 22.08.22 Non-confidential_Redacted".

[100] Uniphar document "*Product Route To Market.pptx.PPTX*", p. 8, Uniphar Response to Phase 1 RFI.

[101] Merger Notification Form, section 4.4.

[102] Uniphar document "*Product Route To Market.pptx.PPTX",* p. 2, Uniphar Response to Phase 1 RFI.

wholesaler and manufacturer. Retail pharmacies can join these intermediary groups and avail of the services they offer. Of the 1,905 retail pharmacies in the State,[103] approximately 980 are members of buying groups and 340 are members of symbol groups.[104]

2.21 The key horizontal overlap in the Proposed Transaction concerns these intermediary buying groups and symbol groups.

Characteristics of buying groups

2.22 Buying groups do not themselves purchase or supply POHPPs. Buying groups negotiate, on behalf of their member pharmacies, discounts and supply terms with multiple suppliers, including manufacturers[105] and wholesalers.[106] Buying groups also agree prices with parallel importers. Pharmacies pay a monthly membership fee to the buying group, and in return can source certain POHPPs at the price the buying group has negotiated with the manufacturers, parallel importers and/or wholesalers. In their negotiations with manufacturers, buying groups secure manufacturer-funded discounts. Buying groups [may] pass on a certain percentage of these discounts to their members. Buying groups also agree prices with parallel importers. Parallel importers submit proposed prices to the respective buying group, which will accept or reject said prices. If accepted, buying group members will then be able to purchase the respective parallel import through the buying group.[107] Buying groups [may] retain a percentage on parallel

[103] Pharmaceutical Society of Ireland. (2022). "Pharmacy Statistics: A summary of the pharmacy register", available at Pharmacies - Website Statistics.sflb.ashx (thepsi.ie).

[104] The Parties' Oral Submission presentation, dated 18 October 2022, slide 24.

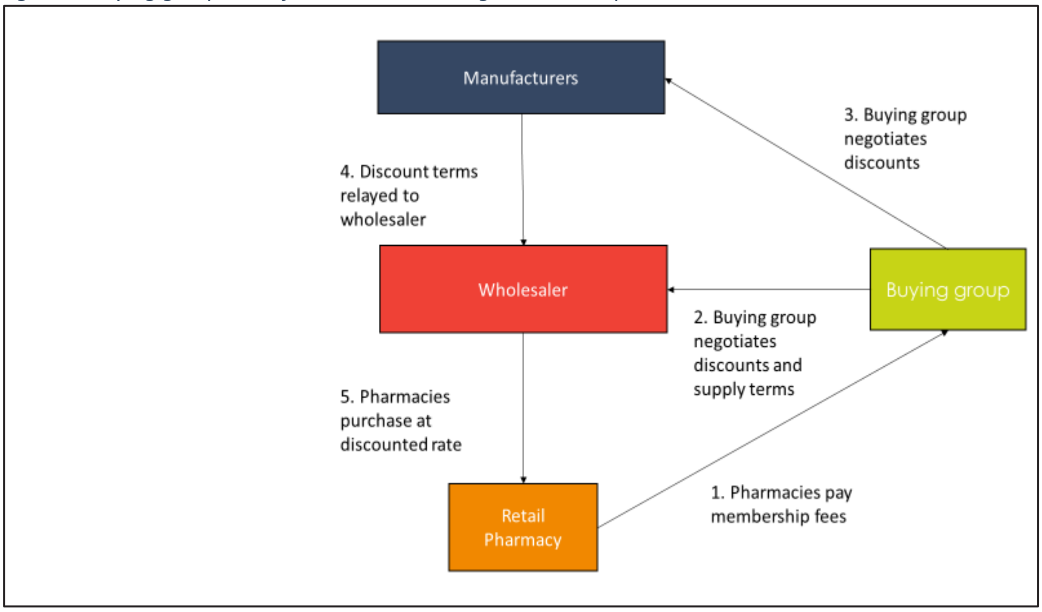
[105] When referring to manufacturers within the context of buying group-manufacturer negotiations and manufacturer-funded discounts, the term 'manufacturer' includes both those companies which manufacture pharmaceutical products, and those more accurately referred to as 'suppliers' of pharmaceutical products. Such suppliers supply their pharmaceutical products to full-line-wholesalers in the State, and occupy, for the purposes of this Determination, the same level of the supply chain as traditional manufacturers.

[106] Buying groups negotiate with both full-line wholesalers and short-line wholesalers/parallel importers.

[107] NaviCorp notes that [redacted] see the Written Response, paragraph 5.27. Also see Supplementary Economics Report, p. 13.

imports sold via the buying group. [redacted].[108] With respect to their negotiations with wholesalers, buying groups negotiate wholesale-discounts and supply terms (e.g., delivery terms). Pharmacies can be members of different buying groups simultaneously, which is commonly referred to in the sector as *"multi-homing"*.

Figure 4: Buying group-manufacturer discount negotiation and provision.



Source: The Commission

2.23 In addition to securing discounts and supply terms for their members, buying groups may also provide IT software or technology platforms relating to supply chain management, which enables pharmacies to order through the buying group's platform, analyse their ordering patterns, identify supply issues, and compare prices of different POHPPs.

2.24 The Parties have classified buying groups in different ways throughout the course of the Commission's investigation. Four different classifications have been used by the Parties when referring to various buying groups: 'à la carte' buying groups, 'compliance-based' buying groups, 'commercial' buying groups, and 'collective'

[108] Written Response, paragraph 5.27.

buying groups. The classification is largely based on the Parties' view of the range of services offered, with the business model of the buying group also taken into account. The Parties' views of these classifications of buying group is summarised below.

2.25 Uniphar labels one of its buying groups, LinkUp, as an à la carte model of a buying group, which offers *"ad hoc discounts on a limited range of POHPPs only. The à la carte nature of this model means that members avail of discounts on an opt-in/opt-out basis and are therefore commonly members of other buying groups which offer a broader range of POHPPs and better discounts"*.[109] LinkUp does not have a website, and Uniphar [redacted] Uniphar suggests that LinkUp and Pharma le Chéile (owned by United Drug) are à la carte buying groups.[110]

2.26 Compliance-based buying groups tend to offer discounts on a larger range of POHPPs, and will generally offer their members higher levels of discounts compared to à la carte buying groups. Compliance-based buying groups focus on ensuring their members purchase products on which the buying group has secured discounts. In other words, they focus on ensuring compliance. Buying groups can leverage their respective level of compliance when negotiating with manufacturers to obtain higher levels of discounts. Compliance-based buying groups also generally operate IT platforms, such as those described in paragraph 2.23. For example, LinkUp Gold, Axium and Pharmax are identified by the Parties as compliance-based buying groups which operate IT platforms.[111]

[109] Uniphar Response to Phase 2 RFI, p. 4.

[110] Uniphar Response to Phase 2 RFI, p. 4.

[111] United Drug also identified Pharmax as a compliance-based buying group, see United Drug Response to Information Request, Q1, saved as "2022.08.22 CCPC 01.07.22- 22.08.22 Non-confidential_Redacted".

2.27 The Parties classify commercial buying groups as a category comprising both à la carte and compliance-based buying groups. Commercial buying groups operate for commercial gain by providing buying group services to their members. Commercial buying groups charge membership fees and [redacted].[112]

2.28 Finally, the Parties have also used the term collective buying group. These groups consist of groups of individual retail pharmacies which pool their purchasing volumes to negotiate discounts with manufacturers. However, these groups do not operate for the group's commercial gain but for the benefit of the individual pharmacies. Collective buying groups are akin to cooperatives, and do not offer services to pharmacies outside the group. Collective buying groups have traditionally arisen where pharmacy owners share collegial or community ties. Uniphar identified two collective buying groups: Pharma Alliance and Chemco Pharmacy. However, the Commission notes that Pharma Alliance consists of three common-ownership groups ([redacted])[113] who collectively negotiate discounts. Each common-ownership group remains separate except for the purposes of collective negotiation. Accordingly, the Commission views Pharma Alliance as more akin to a common-ownership group than a collective buying group.

2.29 The Commission considers the Parties' views of the different classifications of buying group in its discussion of the relevant product and geographic markets in Section 3 of this Determination.

[112] The amount retained can vary by buying group.

[113] Pharma Alliance consists of approximately 40 pharmacies, each of which, except one, is commonly owned by one of the three common-ownership groups which comprise Pharma Alliance. The sole non-owned pharmacy is run by [redacted] on behalf of a pharmacist who is unwell. Pharma Alliance noted there is a likelihood that this pharmacy will be acquired by [redacted] in the coming years. See Pharma Alliance Call Note, dated 29 July 2022, p. 1-2, saved as "2022.07.29 CCPC Call with Pharma Alliance_Redacted".

2.30 Using Uniphar's definition of commercial buying groups, there are currently six buying groups in the State, as illustrated by Figure 5 below. Uniphar owns LinkUp and LinkUp Gold. United Drug owns Pharma Le Chéile and Pharmax. Axium and IndeGo Plus are the only buying groups not owned by a full-line wholesaler.

Figure 5: Buying groups active in the State

Source: The Commission

Buying group dynamics

Recruitment and retention of members

2.31 Buying groups compete for member pharmacies. The primary function of a buying group is to secure discounts for its members, which it achieves by exercising its members' collective buying/bargaining power on manufacturers and wholesalers. Larger buying groups can secure larger discounts for their members and generate greater revenue.[114] Consequently, and as NaviCorp has stated in its response to

[114] Some manufacturers contacted by the Commission stated that the size or scale of a buying group would be factors which would impact the discount obtained. Menarini stated that they deal "*with the bigger buying groups and bigger retail groups as there just is not enough time to engage with true independents or smaller groups of 5/6 pharmacies*" [See Menarini Call Note, dated 30 June 2022, saved as "2022.06.30 Call with Menarini_Redacted.docx]. Manufacturer X considers the combination of "*both size and quality (turnover and compliance)*" when negotiating with buying groups. [See Manufacturer

the Phase 1 RFI (the "NaviCorp Response to Phase 1 RFI"), *"buying groups see every pharmacy within the State as a potential customer"*.[115]

Competitive factors

2.32 On the basis of the information that has been provided to the Commission, buying groups compete mainly on the following three factors: (i) pricing; (ii) quality of service and technology; and (iii) range of POHPPs

Pricing

2.33 While buying groups charge membership fees, they primarily compete on the basis of the discounts they secure for their members. Buying groups may negotiate discounts with full-line wholesalers, manufacturers and parallel importers.

2.34 Uniphar states that full-line wholesalers typically offer discounts of between [redacted] of an available [redacted] off the trade price on patented products.[116]

2.35 In addition, buying groups are able to secure separate discounts directly from manufacturers. Buying groups negotiate manufacturer-funded discounts in three ways. First, the respective buying group will invite manufacturers to tender for the supply of products to achieve the best available price for the members of the buying group. Second, buying groups will engage with manufacturers where there are expected or actual supply issues with their existing partner manufacturers. Third, manufacturers may approach buying groups seeking to enter into an arrangement whereby its products will be made available to buying group

X Call Note, dated 29 June 2022, saved as "2022.06.30 Call with Manufacturer x - Non-Confidential_Redacted.pdf"]. Teva stated that "*the negotiations with customers are based on* [redacted] *the* [redacted] *being supplied as well as other competitive conditions in the market and not necessarily influenced by buying group size*" [See Teva Call Note, dated 05 July 2022, saved as "2022.07.05 Call with Teva.Teva's comments_Redacted].

[115] NaviCorp Response to Phase 1 RFI, Q10.

[116] Uniphar's Response the Commission's informal questions, Q1, dated 3 May 2022. The cited 15% is the standard discount manufacturers offer full-line wholesalers. Of this 15%, full-line wholesalers will pass on a certain amount to pharmacies.

members at a certain price.[117] The level of discounts buying groups secure can vary depending on the type of product. For example, the Supplementary Economics Report noted how discounts in the context of generics can be *"very significant"*, *"significant"* in the context of patented products, and are generally *"not very significant"* in the context of OTC products.[118]

2.36 As noted in paragraph 2.22 above, buying group members can also purchase parallel imports through the buying group. In the case of Axium, parallel importers upload their prices to Axium by [redacted] [120] NaviCorp states that Axium [redacted].[121] The Parties stated in the Written Response that Uniphar's system *"works on the exact same principles as the Axium system in respect of parallel imports i.e.* [redacted]*."*[122]

Quality of Service and Technology

2.37 Buying groups also compete on the quality of service they provide to their members, which includes traditional customer service helplines. Certain buying groups operate specific technology platforms through which their members can place orders, be informed of upcoming supply issues and special offers, submit reimbursement claims under State schemes, and analyse their purchasing patterns and stock levels. For example, Axium operates an eponymous buying

[117] A key benefit that manufacturers derive from agreeing discounts with buying groups is demand and volume certainty.

[118] Supplementary Economics Report, p.12.

[119] [redacted]

[120] NaviCorp Response to Phase 2 RFI, Q16, paragraph 16.9.

[121] Written Response, paragraph 5.27.

[122] Written Response, paragraph 5.28.

platform, which all members have access to and purchase products through. Axium members can also avail of two additional technology platforms for additional fees. iGnite is a business intelligence platform that provides members with information and analytics regarding business activities, such as ordering products and HSE reimbursement claims. Axium also offers its members the [redacted][123]

Range of POHPPs

2.38 Buying groups compete on the range of products on which they have secured discounts, with a greater range of discounted products offering prospective members greater incentives to join the buying group. Currently, Axium members can source approximately [redacted]% of their POHPPs at Axium-negotiated prices.[124] A related factor to the range of POHPPs buying groups secure discounts on is the consistency of supply of POHPPs. Consistency of supply refers to the regularity of delivery and the availability of POHPPs, and is a key area of concern for retail pharmacies.[125] Consequently, buying groups consider supply issues when negotiating discounts with manufactures and supply terms with full-line wholesalers. For example, NaviCorp's 'Wholesale and Brokerage Agreement' with Uniphar specifies that [redacted][127]

[123] NaviCorp Response to Phase 2 RFI, Q8, paragraphs 8.3-8.7.

[124] NaviCorp Response to Phase 1 RFI, Q10.

[125] Supplementary Economics Report, p. 6.

[126] NaviCorp document "*Uniphar-Thera Pharmaceutical Wholesale Agreement*", dated 15 December 2015, NaviCorp Response to Phase 1 RFI. See terms 29 through to 47.

[127] NaviCorp document "*Sales brochure 297x167mm (Axium.PDF)*", NaviCorp Response to Phase 1 RFI.

Operation of buying groups

2.39 On the basis of the information provided to it, the Commission has considered three key aspects of the operation of buying groups. These are:

(a) securing manufacturer-funded discounts:

(b) offering a wider range of services; and

(c) entering into an agreement with a full-line wholesaler in the State.

Securing manufacturer-funded discounts

2.40 The two main factors manufacturers consider when negotiating with buying groups are the buying group's size (both in respect to its number of member pharmacies and the volume of purchases of its members) and compliance.[128] As noted in the Supplementary Economics Report: *"It is the manufacturer who decides the extent of the discount to be offered to each specific entity and this discount will depend on the scale/commitment mix".*[129]

2.41 A buying group's size is important as it translates into buying/bargaining power for the buying group looking to secure manufacturer-funded discounts and discounts and supply terms with full-line wholesalers. As the Parties have noted, "[redacted]".[130] A buying group's size is important from a manufacturer's perspective

[128] Manufacturer X considers the combination of "*both size and quality (turnover and compliance)*" when negotiating with buying groups. [See Manufacturer X Call Note, dated 29 June 2022, saved as "2022.06.30 Call with Manufacturer x - Non-Confidential_Redacted.pdf"]. ROWA stated that Axium's ability to negotiate large discounts was due to "*their ability to buy in huge quantities and the fact that their pharmacies are high turnover pharmacies*" [See ROWA Call Note, dated 26 June 2022, saved as "2022.06.27 Call with Rowa_Redacted"]. Pfizer stated that they "*negotiate deals based on volume and would have volume thresholds…the more a buying group buys the greater the discount*." [See Pfizer Call Note, dated 12 July 2022, saved as "CCPC Call with Pfizer_Redacted"]. Teva stated that "*the negotiations with customers are based on* [redacted] *the* [redacted] *being supplied as well as other competitive conditions in the market and not necessarily influenced by buying group size*" [See Teva Call Note, dated 05 July 2022, saved as "2022.07.05 Call with Teva.Teva's comments_Redacted].

[129] Supplementary Economics Report, p. 21. The Commission understands 'commitment' to refer to compliance.

[130] Supplementary Economics Report, p. 27.

as it gives manufacturers confidence of a higher level of volume than they may be able to expect from a smaller buying group.[131] Manufacturers also consider member pharmacies' turnover, which gives an indication of the volume of products member pharmacies may purchase.[132] However, a number of manufacturers emphasised that group size is not the sole determinant when deciding to engage with buying groups or on the price that is eventually agreed, and is considered in tandem with other factors.[133] Manufacturer X noted that, *"… a smaller group may have a successful track record in agreement implementation and so* [Manufacturer X] *would want to negotiate with them irrespective of their smaller size"*.[134]

2.42 Compliance refers to a buying group's ability to ensure its members purchase the products for which discounts are negotiated. In this respect, the Supplementary Economics Report noted how groups with different levels of compliance achieve different levels of discounts:

> *"the author understands that for branded prescription drugs, good discounts are provided to the* [redacted] *and* [redacted] *buying groups, better discounts are provided to the* [redacted] *and* [redacted]

[131] See Menarini Call Note, dated 30 June 2022, p. 2, saved as "2022.06.30 Call with Menarini_Redacted, Pfizer Call Note, dated 12 July 2022, p. 1-2, saved as "CCPC Call with Pfizer_Redacted, and ROWA Call Note, dated 26 June 2022, saved as "2022.06.27 Call with Rowa_Redacted. Also see United Drug Response to Information Request, Q12, saved as "2022.08.22 CCPC 01.07.22- 22.08.22 Non-confidential_Redacted.

[132] Manufacturer X Call Note, dated 29 June 2022, p. 3, saved as "2022.06.30 Call with Manufacturer x - Non-Confidential_Redacted.pdf". The Commission notes that Manufacturer X represents 3.27% of the market for the supply of POHPPs in the State, according to IQVIA data provided by the Parties in its Written Response. Seven of the eight manufacturers contacted by the Commission had a market share of less than 4% in the supply of POHPPs. The Commission contacted these specific manufacturers as they were provided by the Parties in the Merger Notification Form as being in the top 25 suppliers used either one or both of the Parties for the operation of a buying group for retail pharmacies.

[133] See, for example: Teva Call Note, dated 5 June 2022, p. 2, saved as "2022.07.05 Call with Teva.Teva's comments_Redacted"; ROWA Call Note, dated 26 June 2022, p. 2, saved as "2022.06.27 Call with Rowa_Redacted"; Accord Call Note, dated 29 June 2022, p. 3, saved as "CCPC Call Note - CCPC and Accord Healthcare – Redacted"; Manufacturer X Call Note, dated 29 June 2022, p. 3, saved as "2022.06.30 Call with Manufacturer x - Non-Confidential_Redacted.pdf"; GSK Call Note, dated 5 July 2022, p. 2, saved as "2022.07.05 Call with GSK (002) V2_Redacted"; and Viatris Call Note, dated 6 July 2022, p. 2, saved as "2022.07.27 CCPC Call with Viatris_Redacted".

[134] Manufacturer X Call Note, dated 29 June 2022, p. 3, saved as "2022.06.30 Call with Manufacturer X - Non-Confidential_Redacted.pdf".

[redacted] *and some smaller symbols/franchises and retail groups such as* [redacted] *and* [redacted] *but that the best discounts are provided to the larger symbols/franchises and retail groups such as* [redacted] *and* [redacted]*".*[135]

2.43 This quote illustrates that groups with the highest level of compliance achieve the largest discounts. A common-ownership group such as *Boots* consists of centrally-owned and operated pharmacies, and can offer guaranteed levels of compliance as purchasing is carried out centrally. Axium, LinkUp Gold and Pharmax actively seek to ensure compliance among their members, while compliance is not a focus for LinkUp and Pharma Le Chéile.

2.44 Manufacturer X provided details of how Axium excels in terms of compliance:

> *"… if the agreement with the supplier was to use X amount of their products, Axium will persuade their pharmacies to do so. This is attractive to suppliers because it means they can accurately forecast demand and plan for continuity of supply, which makes honouring their end of the deal easier.* [Manufacturer X] *explained that other buying groups are not as tight in ensuring its members honour the agreement".*[136]

2.45 United Drug also explained the importance of compliance when buying groups look to secure manufacturer-funded discounts:

> *"Whilst in general you will receive stronger commercial terms when you have greater volume to offer you must be able to deliver volumes within an agreed range. This helps to explain why "compliance based" Buying Groups have managed to capture such a strong market presence".*[137]

[135] Supplementary Economics Report, p. 21.

[136] Manufacturer X Call Note, dated 29 June 2022, p. 3, saved as "2022.06.30 Call with Manufacturer X - Non-Confidential_Redacted".

[137] United Drug Response to Information Request, Q12, saved as "2022.08.22 CCPC 01.07.22- 22.08.22 Non-confidential_Redacted".

2.46 United Drug also stated:

> *"that manufacturer funded discounts are generally strong when engaging with groups of most sizes and particularly where volumes are predictable over an agreed time frame. At the same time the bigger players with strong compliance will receive stronger commercial terms on an overall basis."*[138]

2.47 Where buying groups cannot provide agreed levels of compliance to manufacturers, the buying group's ability to secure manufacturer-funded discounts is weakened. The Supplementary Economics Report noted how *"to the extent that a specific manufacturer commits to a specific price to a buying group but does not get the expected throughput,* [redacted]*."*[139] The Parties explained the importance of compliance as follows:

> *"a buying group's ability to achieve compliance, i.e. to deliver the sales volumes projected to manufacturers, is important to its ability to negotiate manufacturer discounts. If the buying group delivers compliance and volume, the manufacturer will reward it with attractive discounts. If the buying group does not deliver compliance and volume, the manufacturer will sanction it by reducing its discounts, which in turn reduces the buying group's commercial appeal to pharmacies."*[140]

[138] United Drug Response to Information Request, Q12, saved as "2022.08.22 CCPC 01.07.22- 22.08.22 Non-confidential_Redacted".

[139] Supplementary Economics Report, p. 13.

[140] The Parties Response to the Commission's Questions, dated 9 November 2022. Q2.

2.48 For example, [redacted].[141]

2.49 Competition at the manufacturer level, particularly between generic manufacturers, further incentivises engagement with buying groups, as manufacturers work to ensure their products are supplied to end customers.[142] On this point, Menarini noted: *"If generic suppliers can offer the product for €X then in order to keep its business Menarini has to offer €X to match."*[143] Consequently, while buying group size and compliance are important factors in negotiating discounts as described above, many generic manufacturers may be willing to engage with smaller buying groups in order to compete with manufacturers of comparable products.[144] Manufacturers also consider competition from parallel importers when negotiating prices with buying groups. As detailed in paragraph 2.18(b) above, parallel importers source products from across the EU before supplying them in the State at a cheaper price than the Irish branded equivalent product. The Supplementary Economics Report discusses this dynamic:

> *"The threat of parallel imports for patented products drives their side-deals, i.e. not even the Irish subsidiary of the manufacturer of a patented medicine really has a monopoly on its drug. In particular, the author understands that in order to prevent parallel imports manufacturers are often prepared to put a 'price equalisation' deal in place so as to keep*

[141] Axium-GSK contact, dated 27 September 2022, see, in particular, points 3, 5 and 6.

[142] See Supplementary Economics Report, p. 12. "*the manufacturers, and in particular the manufacturers of competing generics are willing to offer very significant discounts to retailers in their attempt to drive volumes*".

[143] Menarini Call Note, dated 30 June 2022, p. 2, saved as "2022.06.30 Call with Menarini_Redacted".

[144] See, for example: Accord Call Note, dated 29 June 2022, p. 3, saved as "CCPC Call Note - CCPC and Accord Healthcare – Redacted"; Teva Call Note, 5 July 2022, p. 2, saved as "2022.07.05 Call with Teva.Teva's comments_Redacted"; and GSK call note, dated 5 July 2022, p. 2, saved as "2022.07.05 Call with GSK (002) V2_Redacted".

parallel importer product out of Ireland as they tend to be measured on their own country level sales as opposed to total sales within a country."[145]

2.50 Within the context of buying group-manufacturer negotiations, the existence of parallel importers who supply equivalent products to the manufacturer can be leveraged by buying groups to secure greater discounts. NaviCorp described this aspect of negotiating as follows:

> "[redacted]"[146]

2.51 Owing to the factors and dynamics discussed above, it should be noted that several of the manufacturers that spoke with the CCPC noted that while large groups can secure larger discounts, prices are determined on a group-by-group basis, with factors such as size, compliance and inter-manufacturer competition all influencing agreed discounts. Some manufacturers also noted there may not be a great deal of variance in the discounts secured by different buying groups, while others reiterated that larger groups can secure greater discounts.[147] As

[145] Supplementary Economics Report, p.12. "*the manufacturers, and in particular the manufacturers of competing generics are willing to offer very significant discounts to retailers in their attempt to drive volumes*".

[146] NaviCorp Response to Phase 2 RFI, Q6, paragraph 6.4.

[147] Accord noted that discounts had previously varied to a greater extent, but cited the supply issues, arising from Brexit and Covid 19, has created issues for manufacturers in meeting demand. GSK noted that while discounts are identical, there would not be an enormous difference in the discounts offered to the various buying groups. Pfizer noted that

noted in paragraph 2.43 above, the Supplementary Economics Report acknowledged that discount size does vary between different types of groups. In summary, buying group size (membership and volume) and compliance are two key factors in buying group-manufacturer negotiation.

Offering a wider range of services

2.52 While a buying group's primary function is to secure discounts for its members, the provision of additional buying group services, such as technology platforms, has become increasingly important. United Drug noted how these additional services may include access to a business development team for ongoing support, assistance with dispensing claims analysis and reviews of purchase patterns.[148] As NaviCorp noted, as more pharmacies joined buying groups, buying groups *"needed to differentiate themselves in more ways than purely on price alone. This has seen a greater emphasis on buying groups supplying additional services to their members."*[149] This drive by buying groups to differentiate themselves from competing buying groups by providing additional services is also partly a response to retail pharmacy demand. It was noted in the Supplementary Economics Report that:

> *"From a technological perspective, it seems clear that [the] retail pharmacy is looking for additional supports and services to drive efficiencies and free up the pharmacist for the provision of advisory, patient engagement and dispensing services, as opposed to the*

discounts are volume based, and that the more a buying group buys, the greater the discount. However, Pfizer also noted, that discounts did not vary greatly. Menarini noted that larger groups receive larger discounts. See, for example: Accord Call Note, dated 29 June 2022, p. 3, saved as "CCPC Call Note - CCPC and Accord Healthcare – Redacted"; GSK call note, dated 5 July 2022, p. 2, saved as "2022.07.05 Call with GSK (002) V2_Redacted"; Pfizer Call Note, dated 12 July 2022, p. 2, saved as "CCPC Call with Pfizer_Redacted"; and, Menarini Call Note dated 30 June 2022, p. 2, saved as "2022.06.30 Call with Menarini_Redacted".

[148] United Drug Response to Information Request, Q1, saved as "2022.08.22 CCPC 01.07.22- 22.08.22 Non-confidential_Redacted".

[149] NaviCorp Response to Phase 2 RFI, Q2, paragraph 2.7.

conducting of administrative/back-office tasks. Large chains such as Boots and Lloyds have the benefit of group-wide technology platforms and these will drive efficiencies in pharmacy. This increasing role of technology represents a huge challenge for the standalone pharmacy/pharmacist."[150]

2.53 NaviCorp explained that it expects this demand for additional services, such as management support, data analytics, marketing support and training services, to "[redacted]."[151] When discussing the evolution of the pharmaceutical industry, Uniphar explained that the creation of LinkUp Gold was itself a response to demand from Pharma Le Chéile and LinkUp members who were seeking services beyond discounts, such as store performance, off-the-shelf SOPs, category advice, PCRS claims support and on the ground business advice on improving store performance.[152] A key aspect of these additional services is the provision of technology platforms, with NaviCorp stating that it expects:

> "[redacted]"[153]

2.54 The growing trend of buying groups providing a greater range of additional services ensures the provision of these services has become a core component of buying groups' offerings. NaviCorp has noted that the industry has progressed beyond a sole focus on discounts:

[150] Supplementary Economics Report, p. 17.

[151] NaviCorp Response to Phase 2 RFI, Q3, paragraph 3.1.

[152] Uniphar Response to Phase 2 RFI, Q2, p. 16.

[153] NaviCorp Response to Phase 2 RFI, Q28, paragraph 28,7.

"The other main threat there is buying groups expanding their level of service. [redacted] *alluded to it again,* [redacted] *(emphasis added). We are doing it in Axium, we are constantly trying to* [redacted]*"*[154]

2.55 The growing demand for these additional services is evidenced by the movement of pharmacies from buying groups offering services limited to discount negotiation to buying groups offering a wider range of services.[155] Indeed Uniphar, when detailing the evolution of buying groups toward providing services beyond discounts, noted that "*as a result of these changes, members of the* [redacted] *buying groups have started to migrate to* [redacted]".[156] The costs associated with setting up and maintaining a buying group increase as the service offering becomes more sophisticated. To this end, buying groups employ sales and marketing teams.[157] Furthermore, buying groups, as brokers of POHPPs, need to obtain a brokerage licence from the Health Products Regulatory Authority ("HPRA") pursuant to the Falsified Medicines Directive (Directive 2011/62/EU).

2.56 In light of such market trends, both NaviCorp and Uniphar, in response to their respective RFIs, stated that the provision of these additional services is necessary for the buying groups to be successful and viable:

[154] Oral Submissions Transcript, 18 October 2022, p. 57, line 8-18.

[155] LinkUp and Pharma Le Chéile are buying groups which do not provide these additional services. Both groups' memberships [redacted] from 2018 to 2021. LinkUp Gold, Axium and Pharmax, buying groups which offer additional services, all [redacted] their memberships during the same time period. See Uniphar Response to Phase 2 RFI, Q5.

[156] Uniphar Response to Phase 2 RFI, Q2, p. 17.

[157] See Uniphar Response to Phase 2 RFI, Q25(II) and NaviCorp Response to Phase 2 RFI, Q8.

"over the years, pharmacies have begun to look for additional levels of management support from their buying groups and there is a growing demand for this among members. Navi expects this trend to continue and develop further over the next five years. The growth in pharmacies joining franchise or symbol groups has been [redacted] *(noting that Navi had* [redacted] *new franchisees join in 2020 and* [redacted] *new franchisees join in 2021- see further Question 38). Many independent pharmacists are quite wedded to the idea of having "their own name over the door"* and thus do not wish to join a common brand. That said, market pressures on pharmacists continue to increase as outlined in the IPU's 2020 annual review, thus the market and the requirement for buying groups to continue to offer a wider range of differentiated services is quite necessary for the continued success of buying groups."[158]

"buying groups that focus primarily on POHPPs discounts as opposed to broader service offerings (such as LinkUp and Pharma Le Chéile) will likely need to evolve to the provision of additional services in order to remain viable."[159]

2.57 The Commission notes that a decision for a buying group to offer a wider range of services would require significant investment by a potential entrant, as noted by Menarini[160] and Pharma Alliance.[161]

Entering into an agreement with a full-line wholesaler in the State

[158] NaviCorp Response to Phase 2 RFI, Q3, paragraph 3.3.

[159] Uniphar Response to Phase 2 RFI, Q3, p. 19.

[160] Menarini Call Note, dated 30 June 2022, p. 4, saved as "2022.06.30 Call with Menarini_Redacted".

[161] Pharma Alliance Call Note, dated 13 July 2022, p. 4, saved as "2022.07.29 CCPC Call with Pharma Alliance_Redacted.pdf".

2.58 The need to secure an agreement with a full-line wholesaler applies only to a buying group which is independent from the two full-line wholesalers in the State.

2.59 From its establishment in 2009 to 2012, Axium did not have a wholesaler agreement, but instead relied upon each member pharmacy's respective wholesale relationship. This resulted in Axium-negotiated POHPPs being supplied though both full-line wholesalers, depending on which full-line wholesaler was a given member pharmacy's full-line wholesaler.[162] This dynamic changed in 2012. [redacted][164]

2.60 From 2012 to 2015, Axium had a wholesale agreement with United Drug which saw products it negotiated discounts for flow exclusively through United Drug. Axium also agreed a wholesale discount with United Drug during this time.[165] NaviCorp noted [redacted]

2.61 [redacted]

[162] Oral Submission Transcript, 18 October 2022, p. 46, lines 19-23.

[163] Oral Submission Transcript, 18 October 2022, p. 47, lines 14-23.

[164] Oral Submission Transcript, 18 October 2022, p.47, lines 23-27.

[165] Oral Submission Transcript, 18 October 2022, p. 47-48, lines 28-3.

[166] NaviCorp Response to Phase 1 RFI, Q6.

[redacted]

[redacted]”[168]

2.62 [redacted]

[redacted]71

[167] NaviCorp Response to Phase 1 RFI, Q6.

[168] NaviCorp Response to Phase 1 RFI, Q6.

[169] NaviCorp Response to Phase 1 RFI, Q6.

[170] NaviCorp Response to Phase 1 RFI, Q6.

[171] Oral Submission Transcript, 18 October 2022, p. 48, lines 5-16.

2.63 NaviCorp entered into a 'Wholesale and Brokerage Agreement' with Uniphar in 2015.[172] Under the '*Wholesale and Brokerage Agreement*', Axium members source Axium-negotiated products, at Axium-negotiated prices, from Uniphar. [redacted][173]

2.64 ROWA, a manufacturer, noted that the industry had evolved in such a way that for a buying group to be successful it must have a strong relationship with a wholesaler.[174]

2.65 Following implementation of the Proposed Transaction, five of the six buying groups operating in the State would be owned by Uniphar or United Drug, meaning that "*full control of the supply chain* will *sit with the wholesalers*".[175] Given Uniphar and United Drug's vital position within the supply chain, a new buying group would need to secure an agreement with one of the full-line wholesalers to enable their members to source buying-group-negotiated products. The need for such an agreement is discussed further in paragraphs 5.209 - 5.217 in Section 5. Uniphar acknowledged the necessity for such an agreement for non-wholesaler-owned buying groups in its Phase 2 RFI Response: "[redacted]

[172] NaviCorp document "*Uniphar-Thera Pharmaceutical Wholesale Agreement*", dated 15 December 2015, NaviCorp Response to Phase 1 RFI.

[173] NaviCorp document "*Uniphar-Thera Pharmaceutical Wholesale Agreement*", dated 15 December 2015, NaviCorp Response to Phase 1 RFI. See terms 29 through to 47. Also see NaviCorp Response to Phase 1 RFI, Q4

[174] ROWA Call Note, dated 26 June 2022, p. 3, saved as "2022.06.27 Call with Rowa_Redacted". The Commission notes that ROWA represents 1.81% of the market for the supply of POHPPs in the State, according to IQVIA data provided by the Parties in its Written Response. Seven of the eight manufacturers contacted by the Commission had a market share of less than 4% in the supply of POHPPs. According to the parties, ROWA is also one of seven generic manufacturers in the State (paragraph 5.11 of the Written Response). The Commission contacted these specific manufacturers as they were provided by the Parties in the Merger Notification Form as being in the top 25 suppliers used either one or both of the Parties for the operation of a buying group for retail pharmacies.

[175] Viatris Call Note, dated 6 July 2022, p. 3, saved as "2022.07.27 CCPC Call with Viatris_Redacted".

[redacted] "[176]

(d) Role of Symbol Groups

Characteristics of Symbol Groups

2.66 While there can be a certain degree of overlap in the services provided by buying groups and symbol groups (depending on the service and respective groups), the parties stated in the Merger Notification Form that *"the suite of services offered by a buying group to its member is significantly narrower than those offered by a provider of common management/branding services"*.[177]

2.67 The wider suite of services offered by symbol groups in general include branding and store design, marketing, business intelligence and reporting, procurement, HR management, IT management, accounting, etc. To join a symbol group, retail pharmacies enter into an agreement with the group, adopt a common brand, and pay a membership fee or agree a revenue sharing arrangement. A retail pharmacy which joins a symbol group remains independently owned. There are currently six main symbol groups in the State: *Life Pharmacy* and *Allcare* (both owned and operated by Uniphar), *StayWell* and *CarePlus* (both owned and operated by NaviCorp) and CommCare.[178] There are smaller groups, such as *Pure Pharmacy* ("*Pure*"),[179] which operate a small number of franchises.[180] Members of symbol groups also receive manufacturer-funded and wholesale discounts, either directly

[176] Uniphar Response to Phase 2 RFI, Q31(i).

[177] Merger Notification Form, paragraph 5.1.

[178] CommCare was formed through the merger of the *totalhealth* and *Haven* symbol groups. Both these groups continue to operate under their respective brands.

[179] *Pure* currently has two franchises, see Pure Call Note, dated 16 June 2022, p. 2, saved as "2022.06.16 Call Note with CCPC - non-confidential_Redacted".

[180] Lloyds Pharmacy currently has two franchises in the State, see United Drug Response to Information Request, Q17, saved as "2022.08.22 CCPC 01.07.22- 22.08.22 Non-confidential_Redacted".

from the symbol group or from an affiliated buying group.[181] Symbol group members enter into a franchise agreement with their respective symbol group.[182] Symbol groups differ primarily in the level of services they provide to retail pharmacies, the cost of membership and the legal agreement underpinning group membership.

Symbol Group Dynamics

2.68 Symbol groups compete with each other for member pharmacies. For the reasons discussed above in the context of buying groups, larger symbol groups can secure larger discounts for their member pharmacies and generate greater revenue, through membership fees or revenue sharing, for the operator of the group. Symbol groups actively recruit pharmacies from across the State.

Competitive factors

<u>Pricing, supply, and product range</u>

2.69 There are two aspects to a symbol group's pricing, namely the price paid by members to join and remain within the group and the discount on POHPPs that members receive owing to their membership. Certain symbol groups charge a monthly membership fee to members in return for CMB services, while other groups charge a percentage of the member's turnover.[183] Both of Uniphar's

[181] A business may operate both buying groups and symbol groups. For example, NaviCorp operates the Axium buying group as well as the *StayWell* and *CarePlus* symbol groups. If a pharmacy is a member of *StayWell* or *CarePlus*, they are automatically members of Axium. See NaviCorp Response to Phase 2 RFI, Q35.

[182] *Life Pharmacy* members enter into four legal agreements: Deed of Adherence to the Independent Life Pharmacy Shareholder's Agreement; a Trade Mark Licence Agreement (governs the use of the Life Pharmacy trademark); a Service Level Agreement (governs the provision of services to members by Uniphar); and a Purchase Agreement, in relation to the purchasing of products from Uniphar Wholesale. *Allcare* members entering into an Allcare Management Services Franchise Agreement. See Uniphar Response to Phase 2 RFI, Q35, p.7 and Q38(II).

[redacted]

[183] Uniphar document "*Symbol Model Comparisons – Internal Review.pptx.PPTX*", p. 5, Uniphar Response to Phase 1 RFI.

symbol groups, *Life Pharmacy* and *Allcare*, [redacted][184] NaviCorp's two symbol groups operate under differing pricing models. *StayWell*'s [redacted] while *CarePlus* members [redacted][185] *StayWell* and *CarePlus* members also pay further [redacted] Membership fees can vary within a symbol group depending on the services a member purchases.[186]

2.70 New members must also pay one-time costs associated with on-boarding, generally relating to the cost of refitting the pharmacy.[187] Some symbol groups offer financing to members to assist with such costs. Uniphar noted that refitting can cost between €[redacted] to €[redacted] depending on the scale of the refit and nature of the store.[188] NaviCorp noted that the refitting costs faced by retail pharmacies when joining *CarePlus* is between €[redacted] to €[redacted].[189] *StayWell*'s refit cost can be around €[redacted] [redacted][90] The cost of the refit can vary depending on the symbol group and the level of refit desired.

2.71 Retail pharmacies secure discounts on POHPPs owing to their membership of symbol groups. These discounts are the same as those received by pharmacies

[184] Uniphar Response to Phase 2 RFI, Q38.

[185] Merger Notification Form, section 3.3.

[186] Uniphar Response to Phase 2 RFI, Q38. For example, while *Allcare* charges a [redacted] *Life Pharmacy's* membership fee consists of [redacted]

[187] Uniphar document "*Symbol Model Comparisons – Internal Review.pptx.PPTX*", pp. 1-2, Uniphar Response to Phase 1 RFI.

[188] Uniphar Response to Phase 2 RFI, Q35(iii).

[189] NaviCorp Response to Phase 2 RFI, Q38(V).

[190] NaviCorp Response to Phase 2 RFI, Q34(ii), paragraph 34.7.

who are members of buying groups,[191] and consist of wholesale discounts and manufacturer-funded discounts. All symbol groups use their supply arrangements to recruit members, with *Allcare* stating in their recruitment material that *"Allcare members benefit from best-in-class buying with increased purchasing power and stronger supplier arrangements. This leads to higher margins, allows for single pack replacement and provides multiple avenues for sourcing what you need"*.[192]

2.72 Many symbol group members automatically become members of affiliated buying groups owing to their symbol group membership. For example, members of NaviCorp's symbol groups, *Staywell* and *CarePlus*, automatically become members of Axium.[193] Consequently, symbol group members can receive identical discounts obtained by buying groups owing to buying group membership. However, as noted in the Supplementary Economics Report, symbol groups can secure greater discounts than certain buying groups.[194]

2.73 As noted at paragraph 2.39, consistency of supply is a key concern for retail pharmacies. *Allcare* have emphasised this aspect of membership in their recruitment material, stating, *"Allcare members are treated as priority customers if stock is limited within the wider market"*.[195] Symbol groups also compete on the range of products their members can secure at discounted prices, with both *Life Pharmacy* and *Allcare* detailing the range of *"molecules"* members gain access to.[196]

[191] Written Response, paragraph 6.6.

[192] Uniphar document "*Allcare Franchise Brochure.pdf.PDF*", p.2, Uniphar Response to Phase 1 RFI, p. 2.

[193] Merger Notification Form, section 1.1.

[194] Supplementary Economics Report, p. 21.

[195] Uniphar document "*Allcare Franchise Brochure.pdf.PDF*", p. 6, Uniphar Response to Phase 1 RFI.

[196] Uniphar document "*Allcare Franchise Brochure.pdf.PDF*", p. 6, Uniphar Response to Phase 1 RFI, *and* Uniphar document "*Life Pharmacy Brochure.pdf.PDF*", p. 6, Uniphar Response to Phase 1 RFI. Generic POHPPs, are often classified on the basis of their molecules or active ingredients. This brochure details that members can obtain "*generic deals across a portfolio of over 300 molecules*".

Branding and Marketing (Quality of service)

2.74 A key feature of symbol groups is the use of the group brand by its member pharmacies. Members adopt a common brand while maintaining their pharmacy's original name. Both *Allcare* and *StayWell* emphasise how members maintain their pre-membership name:

> *"With Allcare You Keep Your Name and Improve Your Outcome."*[197]

> *"StayWell Pharmacy is an ideal solution if you are an independent pharmacist who wants to accelerate your business through the support of a national brand, whilst maintaining your pharmacy name and values."*[198]

2.75 Both ROWA and Accord also noted the common brand aspect of symbol groups, and described these groups as providing pharmacies with *"a name over the door"*.[199] Members of symbol groups re-brand their pharmacies, as illustrated in Figure 6 and Figure 7 below:

[197] Uniphar document "*Allcare Franchise Brochure.pdf.PDF*", p. 2, Uniphar Response to Phase 1 RFI.

[198] NaviCorp document "*StayWell Brochure 210x210.PDF*", p. 3, NaviCorp Response to Phase 1 RFI.

[199] ROWA Call Note, dated 26 June 2022, p. 4, saved as "2022.06.27 Call with Rowa_Redacted" and Accord Call Note, dated 29 June 2022, p. 2, saved as "CCPC Call Note - CCPC and Accord Healthcare – Redacted".

Figure 6: Example of StayWell member pharmacy.

Source: NaviCorp.[200]

Figure 7: Example of Allcare member pharmacy.

Source: allcarepharmacy.ie/storelocator/

2.76 Members also brand and redesign the interior of their pharmacy. Each symbol group offers a 'Territory Manager' to its members, who works with member pharmacies to support sales performance and operational effectiveness. *Allcare*

[200] NaviCorp document "*StayWell Brochure 210x210.PDF*", p. 5, NaviCorp Response to Phase 1 RFI.

noted how its Territory Managers work with its members to *"make the changes you [the member] need to optimise the return from every square metre of space in your store"*.[201] The redesigning of the store aims to improve customer engagement and experience. Symbol groups emphasise the speed with which adoption of a common brand can be achieved, as pharmacies will often need to close for branding and redesigning work to be carried out.

Figure 8: StayWell store design

Source: NaviCorp.[202]

2.77 In addition to operating under their group's brand, member pharmacies receive marketing support. Marketing support can entail a wide range of services, including advertising campaigns focused on the member's locality, national brand-focused advertising campaigns, and social media training for staff, loyalty cards, customer competitions, and product promotions.[203] By sourcing branding and marketing services centrally from their symbol group, member pharmacies can avail of a greater level of brand awareness and marketing support than if they remained independently branded.

[201] Uniphar document "*Allcare Franchise Brochure.pdf.PDF*", p. 5, Uniphar Response to Phase 1 RFI.

[202] NaviCorp document "*StayWell Brochure 210x210.PDF*", p. 15, NaviCorp Response to Phase 1 RFI.

[203] See Uniphar document "*Allcare Franchise Brochure.pdf.PDF*", pp. 9-10, Uniphar Response to Phase 1; NaviCorp document "*StayWell Brochure 210x210.PDF*", p. 11, NaviCorp Response to Phase 1 RFI; Uniphar document "*Life Pharmacy Brochure.pdf.PDF*", p. 9, Uniphar Response to Phase 1; and Uniphar document "*Life Symbol Recruitment Presentation.pdf.PDF*", pp. 32-46, Uniphar Response to Phase 1 RFI.

Office and business support and Technology

2.78 Symbol groups provide a wide range of office and business support services to members. Symbol groups emphasise these support services when recruiting new members, noting how membership affords independent pharmacies a level of support and service beyond the level independent pharmacies can avail of themselves, as seen in *StayWell*'s recruitment material, as shown in Figure 9 below:

Figure 9: [redacted]

[redacted]

Source: NaviCorp.[204]

2.79 Symbol groups offer members business intelligence and reporting services, which include KPIs, benchmarking, and business analysis. *Allcare* outline the benefits to pharmacies of availing of these services, noting that:

> *"One of the key advantages that groups have over independents is timely and easy access to information to make the right commercial decisions. Allcare provides … an excellent Business Intelligence System that shows*

[204] NaviCorp document "*Scrapbook-Part1-Navi-Retail-Brands.pptx*", p. 19, NaviCorp Response to Phase 1 RFI.

you exactly which products are making money for you and which are not".[205]

2.80 Member pharmacies receive regulatory support and state reimbursement claims analysis, which ensure regulations are adhered to and that the Health Service Executive's (*"HSE"*) claims process[206] is followed correctly. Member pharmacies' staff receive training centrally from the group, which can relate to regulation, IT systems, and sales. Symbol groups also operate customer-facing apps, through which customers can order prescriptions, book appointments and be updated about pharmacy deals.[207]

Operation of Symbol Groups

2.81 On the basis of the information provided to it, the Commission has considered factors relevant to the establishment and operation of symbol groups. The first factor relates to the set up and operating costs required to establish and operate a symbol group. The second factor is the need to recruit member pharmacies and acquire scale.

Set-up and operating costs

2.82 In order to create a symbol group a new entrant would would incur set-up and operating costs. These costs include brand development and marketing costs, staffing and payroll costs, symbol membership/franchise agreement legal costs, technology costs, and retrofitting/financing costs.

2.83 The creation of a common brand is a key cost faced by symbol groups. While costs can vary, the Parties estimate that establishing, marketing and developing a

[205] Uniphar document "*Allcare Franchise Brochure.pdf.PDF*", p. 5, Uniphar Response to Phase 1 RFI.

[206] The process by which pharmacies are reimbursed for dispensing products to public customers.

[207] Uniphar document "*Life Pharmacy Brochure.pdf.PDF*", Uniphar Response to Phase 1 RFI.

common brand can cost between €[redacted] to €[redacted].[208] For example, NaviCorp noted that *CarePlus*' first year set up costs in 2014, [redacted], while *StayWell* incurred costs of [redacted][09]

2.84 Symbol groups employ sales, marketing, and administration staff, the costs of which can vary depending on the specific symbol group. Uniphar noted that in its experience payroll costs, including cars for field-based staff, can range from €[redacted] to over €[redacted] per annum depending on the range of in-house services supplied.[210]

2.85 Symbol groups often operate different types of technology platforms. These can include ordering platforms, back end management systems, POS/till systems, and central communication systems. The cost of these systems can vary, with Uniphar estimating that developing, *"a head office cascade system, business intelligence stack and various system integrations can range from €[redacted] - €[redacted] depending on the level of sophistication and integration layers across the systems"*.[211] Uniphar also noted that these technology platforms can be acquired from third party providers as opposed to being developed in-house (see the Commission's analysis of this point below in paragraphs 5.183-5.199).

2.86 Lastly, symbol groups often offer financing to members to enable them to meet the cost of refitting their pharmacy. As noted in paragraph 2.70 above, refitting can cost between €[redacted] to €[redacted] depending on the scale of the refit and nature of the store.[212]

[208] Uniphar Response to Phase 2 RFI, Q40(i); NaviCorp Response to Phase 2 RFI Q38(i).

[209] NaviCorp Response to Phase 2 RFI Q38(i).

[210] Uniphar Response to Phase 2 RFI, Q40(i).

[211] Uniphar Response to Phase 2 RFI, Q40.

[212] Uniphar Response to Phase 2 RFI, Q35(iii).

Recruiting members and generating scale

2.87 As noted at paragraph 2.68, symbol groups compete for member pharmacies. Acquiring scale is important for symbol groups for several reasons. First, symbol groups need to acquire scale to ensure their investment is cost-effective. Second, acquiring sufficient scale allows symbol groups to maintain their membership fees at competitive levels.[213] Symbol groups also require scale in order to secure manufacturer-funded discounts.[214] Finally, the attainment of scale is central to the very nature of a symbol group's offering to pharmacies. By operating a common brand, symbol groups offer their members branding and marketing support to enable them to compete with common-ownership groups and large retail chains. In order to generate sufficient brand awareness and recognition, symbol groups need to be able to generate and acquire scale.[215]

2.88 However, symbol groups face a range of challenges in acquiring scale. Uniphar has noted that pharmacy owners have to decide to adopt a common brand, and potentially lessen their independent identity in order to join a symbol group.[216] Furthermore, pharmacy owners consider a symbol group's track record, support offering and brand investment plan when deciding whether to become a member of that symbol group.[217] The cost of refitting a pharmacy when joining a symbol group requires a considerable capital investment on behalf of the pharmacy owner,[218] and this represents a key challenge when attempting to acquire scale.

[213] Uniphar Response to Phase 2 RFI, Q40(vi).

[214] Uniphar Response to Phase 2 RFI, Q40 (vi).

[215] Uniphar Response to Phase 2 RFI, Q40(vi).

[216] Uniphar Response to Phase 2 RFI, Q40(v).

[217] Uniphar Response to Phase 2 RFI, Q40(ix).

[218] Uniphar Response to Phase 2 RFI, Q35(iii).

3. RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

Introduction

3.1 In this section, the Commission identifies the potential product and geographic markets that are relevant for the assessment of the likely effects of the Proposed Transaction. This section sets out the general principles that apply to market definition, the overlaps in the activities of the Parties, the views of the Parties and third parties and then sets out the Commission's view of the relevant product and geographic markets.

3.2 Market definition provides a framework for assessing the competitive effects of a merger; it is a means to an end. The boundaries of a market do not in themselves determine the range of competitive effects to be assessed by the Commission in its merger review, as there may be competitive constraints on the merging parties from outside the relevant market or segmentation within the relevant market.[219] The Commission has taken such factors into account in its assessment of competitive effects of the Proposed Transaction, where relevant.

Horizontal and Vertical Overlap

3.3 In the Merger Notification Form, the Parties have addressed the horizontal overlaps between their respective activities as follows:

> *"Uniphar and the Target overlap in the following business areas:*
>
> - *Operation of a buying group for retail pharmacies*

[219] Guidelines for Merger Analysis, adopted by the Commission on 31 October 2014 (the "Merger Guidelines"), paragraph 2.1 and 2.3.

- *Provision of common management/branding services to retail/community pharmacies*

- *Wholesale supply of POHPPs."*[220]

3.4 According to the Parties, there is no horizontal overlap in practice between Uniphar and NaviCorp in the wholesale supply of POHPPs.[221] The Parties submitted that Uniphar acts as a full-line wholesaler of POHPPs, while NaviCorp is mainly engaged in wholesaling on the export/parallel trade side of its business. The Parties submitted that although the trading division of NaviCorp, Navi Trading, is a wholesale business holding a wholesale licence from the HPRA which would, in principle, entitle NaviCorp to wholesale POHPPs to retail pharmacies in Ireland, [redacted].

3.5 With respect to vertical overlaps between their respective activities, the Parties specified vertical relationships as follows:

> *"<u>Operation of a buying group for retail pharmacies and operation of retail pharmacies</u>*
>
> *There is a vertical overlap in that the Target, via Axium, operates a retail pharmacy buying group while Uniphar operates retail pharmacies.*
>
> *<u>Wholesale of POHPPs and operation of a buying group for retail pharmacies</u>*
>
> *There is a vertical overlap in the wholesale of POHPPs and the operation of a retail pharmacy buying group. Uniphar is active in the wholesale of POHPPs while Axium operates a retail pharmacy buying group. As*

[220] Merger Notification Form, section 4.1.

[221] Merger Notification Form, section 4.1.

mentioned, Uniphar has an agreement with Axium for the supply of POHPPs.

Operation of retail pharmacies and provision of common management/branding services

Uniphar provides common management and branding services via Allcare and Life. The Target provides common management and branding services to its franchisees and members via Careplus and Staywell. Uniphar owns/operates a number of retail pharmacies."[222]

3.6 With reference to the wholesale supply of POHPPs, the Parties stated that:

"There is a theoretical overlap in the wholesale of POHPPs by the Target and operation of retail pharmacies by Uniphar. However, in practice this does not arise as the Target is not engaged in wholesale supply of POHPPs to retail pharmacies in the State and, in addition, does not operate retail pharmacies."[223]

3.7 The Commission agrees with the Parties' views of vertical and horizontal overlaps. The Commission's view is that Uniphar and NaviCorp are, in principle, potential competitors in the wholesale supply of POHPPs by virtue of the NaviCorp licence from the HPRA. However, a Commission site visit[224] confirmed the Parties' submission that there is no actual horizontal overlap with respect to the provision of POHPPs to retail pharmacies in the State. For this reason, the Commission does not need to come to a definitive view on the boundaries of a potential market for the wholesale supply of POHPPs in this Determination.

3.8 The Commission recognises the vertical relationships identified by the Parties relating to the operation of buying groups and retail pharmacies, and the provision

[222] Merger Notification Form, section 4.2.

[223] Merger Notification Form, section 4.2.

[224] Site visit, 4 May 2022.

of CMB services and retail pharmacies. However, there is no horizontal overlap in retail pharmacies, as NaviCorp does not own or operate retail pharmacies. For this reason, the Commission does not need to come to a definitive view on the boundaries of a potential market for the operation of retail pharmacies in this Determination.

Relevant principles

3.9 The role of market definition is explained in the Commission's Merger Guidelines as follows:

> *"Market definition is a conceptual framework within which relevant information can be organised for the purposes of assessing the competitive effect of a merger. Identifying the precise relevant market involves an element of judgement. It is often not possible or even necessary to draw a clear line around the fields of rivalry. Indeed, it is often possible to determine a merger's likely impact on competition without precisely defining the boundaries of the relevant market."*[225]

> *"…if an SLC can be shown when a merger is evaluated with respect to a number of alternative markets, there is no need to choose between them; it will be sufficient to show that the merger will result in an SLC regardless of the choice of market definition."* [226]

3.10 According to the Merger Guidelines:

> *"The relevant product market is defined in terms of products rather than producers. It is the set of products that customers consider to be close substitutes. In identifying the relevant product market, the Commission*

[225] Merger Guidelines, paragraph 2.3.

[226] Merger Guidelines, paragraph 2.4.

will pay particular attention to the behaviour of customers, i.e., demand-side substitution. Supply-side substitution (i.e., the behaviour of existing and/or potential suppliers in the short term) may also be considered".[227]

3.11 The relevant market contains the most significant alternatives available to the customers of the merging parties. Identifying the precise relevant market involves an element of judgement, with appropriate weight being given to factors on both the demand and supply side.[228]

3.12 The Merger Guidelines note that:

> *"Whether or not a product is a close substitute of a product supplied by one or more of the merging parties will depend on the willingness of customers to switch from one product to the other in response to a small but significant and non-transitory increase in price (or an equivalent decrease in quality). This will involve an assessment of the characteristics and functions of the products in question".*[229]

3.13 The standard economic test for defining the relevant market is the Small but Significant Non-transitory Increase in Price (''SSNIP'') test. The SSNIP test seeks to identify the smallest group of products and geographic areas within which a hypothetical monopolist could profitably impose a SSNIP without a sufficient number of consumers/service purchasers switching to alternative products to render the price increase non-profitable. However, the Commission notes that the SSNIP test is just one of the tools used in defining the relevant product market, and its applicability varies depending on pricing practices in the market. A substantial emphasis should also be placed on product characteristics, price and

[227] Merger Guidelines, paragraph 2.8.

[228] Merger Guidelines, paragraph 2.2.

[229] Merger Guidelines, paragraph 2.9.

intended use as well as observed substitution patterns between various products that can potentially be included in the same product market.

3.14 Market definition should not restrict the range of competitive effects to be assessed by the Commission in its merger review. In coming to a view of the relevant product and geographic markets, the Commission may therefore consider segmentation within the relevant market or factors outside the relevant market that impose competitive constraints on firms in the relevant market.[230]

3.15 Ultimately, the Commission's definition of the relevant market or markets depends on the specific facts, circumstances, and evidence of the merger under investigation.[231]

Relevant Product Markets

Previous decisions

3.16 The Commission has previously considered several mergers in the pharmaceutical sector that are of some relevance to the assessment of the Proposed Transaction. The following are included as background to the current analysis.

3.17 The Commission has considered a potential relevant product market for CMB services in three previous merger determinations. In *M/18/085 - Uniphar/Bradley's Pharmacy Group*, the Commission examined the supply of CMBs to retail pharmacies in the State.[232] The Commission adopted the same

[230] Merger Guidelines, paragraph 2.1.

[231] Merger Guidelines, paragraph 2.6.

[232] *M/18/085 – Uniphar/Bradley's Pharmacy Group*, paragraph 24.

approach in *M/18/097 – Uniphar/Certain pharmacy business of Inischem DAC*[233] and *M/20/027 Uniphar/Hickey's*.[234]

3.18 While the Commission has not identified buying group services as a potential relevant market in previous decisions, the Commission did identify a difference between the services provided by buying groups and the supply of CMB services in *M/18/085 - Uniphar/Bradley's Pharmacy Group*.[235]

3.19 The Commission is not aware of any EU decisions that are directly relevant for this case.

Views of the Parties

3.20 In the Merger Notification Form, the Parties identified the following potential product markets:

- Operation of a buying group for retail pharmacies;
- The supply of common management and branding services to retail pharmacies;
- The wholesale supply of POHPPs; and,
- The operation of retail pharmacies.[236]

3.21 A similar market delineation was identified in the Economics Report[237] which was submitted to the Commission by the Parties:

> *"….it seems reasonable to focus at least initial attention on the following product and geographic markets:*

[233] *M/18/097 – Uniphar/Certain pharmacy businesses of Inischem DAC*, paragraph 24.

[234] *M/20/027 – Uniphar/Hickey's*, paragraph 27.

[235] *M/18/085 – Uniphar/Bradley's Pharmacy Group.*

[236] Merger Notification Form, section 5.1.

[237] Provided at Annex 7.3(a) to the Merger Notification Form.

(i) the supply of prescription medicines by retail (as in community) pharmacies in the State;

(ii) the wholesale of pharmacy-only human pharmaceutical drugs in the State;

(iii) the supply of common management/branding services to retail pharmacies in the State; and,

(iv) the supply of buyer group services to retail pharmacies in the State."[238]

3.22 In the Supplementary Economics Report, Professor O'Toole refers to his understanding that:

"…the CCPC is considering the possibility that there exists a meaningful competition policy product market for the provision of buying group services, i.e. the negotiation of discounts with manufacturers of POHPPs, provided to retailers by buying groups…"[239]

3.23 Later in the Supplementary Economics Report, Professor O'Toole appears to depart from the position which he initially adopted in the Economics Report:

" …. it is not at all clear that there is a meaningful product market for the provision of buying group services to retailers by (narrowly defined) commercial buying groups from a competition policy perspective."[240]

3.24 Elsewhere in the Supplementary Economics Report, Professor O'Toole elaborated on his views as to the relationship between the operation of buying groups and the provision of CMB services:

[238] Economics Report, p. 7.

[239] Supplementary Economics Report, p. 19.

[240] Supplementary Economics Report, p. 26.

"neither the provision of buying group services to (otherwise) independent pharmacies nor the provision of common management/branding services to members of symbols/franchises represent a meaningful product market from an economics of competition policy perspective, unless one is willing to broaden the product market definition to incorporate, for example, the exact same buying group and/or common management/branding services that are provided internally within retail groups such as Boots (and independent pharmacies) and externally to symbol/franchise groups such as, say, to Life Pharmacy by Uniphar."[241]

"the buying group (commercial or collective) is just one of the formats/business models used to facilitate pharmacies getting discounts from manufacturers and manufacturers getting volume commitments from groups of retailers, especially so with respect to generics where there is a significant level of competition to be expected between the manufacturers/owners of generics that have been deemed to be interchangeable.

Symbols groups and retail groups are two other business models that also conduct these negotiations".[242]

"It is crucial to realise that the five commercial buying groups represented in Table 1 represent just a subset of the providers of buying groups services. The providers of buying group services also include the symbols/franchises and the retail groups as well as combinations of retail groups (as well as other buying group type entities)".[243]

3.25 In their Written Response, the Parties, notwithstanding that the Commission's approach to market definition in the Assessment was consistent with that of the

[241] Supplementary Economics Report, p. 2.

[242] Supplementary Economics Report, p. 20.

[243] Supplementary Economics Report, p. 21.

Parties in the Merger Notification, submitted that the market definition set out in the Commission's Assessment was:

> *"overly simplistic, artificial and based on an overly narrow view of the competitor set."*[244]

3.26 In their Written Response, the Parties contend that:

> *"The Parties consider the appropriate competitor set for buying groups include commercial buying groups, collective buying groups, symbol groups, direct sales from manufacturers and parallel importers and, to a lesser extent, common ownership groups."*[245]

> *"The Parties consider the appropriate competitor set for management and branding services includes self-supply (including through acquiring some services via specialist providers) and CMB providers and, to a lesser extent, common ownership groups."*[246]

3.27 In this regard, the Parties cite the extracts from the Supplementary Economics Report quoted in paragraph 3.24 above.[247]

3.28 The Frontier Report expresses the view, in respect of the provision of buying group services, that:

> *"[T]he Assessment has … taken an overly narrow approach in defining the competitor set for commercial buying groups. As a result the CCPC has substantially underestimated the number of competitors in the market and the broader competitive constraints faced by the Parties. Alternatives,*

[244] Written Response, paragraph 6.2.

[245] Written Response, paragraph 6.3.

[246] Written Response, paragraph 6.4.

[247] Written Response, paragraph 6.7.

such as manufacturers, parallel importers, and CMB providers, are sufficiently close substitutes to be considered direct constraints for buying groups, as shown by the high proportion of pharmacies' demand that can be readily serviced by different routes to market and the substantial extent of switching between business models. The Assessment incorrectly downplays these sources of competitive constraint." [248]

3.29 In respect of the provision of CMB services, the Frontier Report states:

> *"[T]he Assessment has taken an overly narrow approach to defining the market by only considering CMB providers, as competition for management and branding services takes place between business models (e.g. between self-supply and CMB services), not just within business models. In fact, the evidence in the Assessment shows that the majority of switching takes place between business models rather than within business models. A market definition where more switching takes place to firms outside the market than within the market does not make sense…".*[249]

Views of Third Parties

3.30 Based on the Parties' view of the market definition expressed in the Merger Notification Form and in the Economics Report, the Commission engaged with a number of third parties in relation to the relevant market definition. The Commission asked United Drug if it viewed retail pharmacy buying groups and retail pharmacy symbol/franchise groups as supplying different services to retail pharmacies. In its response, United Drug stated that it differentiated between retail buying groups and *"symbol/franchise groups"*:

[248] Frontier Report, paragraph 9(b).

[249] Frontier Report, paragraphs 6(a) and 87(a).

> "[United Drug] *would view retail pharmacy buying groups and retail pharmacy symbol/franchise groups as supplying different services to retail pharmacies in the following ways. Franchise/Symbol Groups will offer a "brand" as part of the proposition and may offer a range of services over and above a standard buying group. Such services may include, Category Management, HR & finance support services, local and/or national advertising campaigns, analytical services, technology support, such services would be considered value added to the member on top of the buying power benefit of been [sic] a member of solely a buying group. For clarity both types of groups negotiate discounts and supply terns with manufacturers and wholesalers on behalf of their members [sic]."*[250]

3.31 Of the retail pharmacies contacted by the CCPC during the course of the investigation, very few considered that there were no differences between buying groups and providers of CMB services. Most of the other respondents pointed out differences. For example, in response to the question, *"In your opinion, do pharmacy buying groups and pharmacy symbol/franchise groups provide different services?"* retail pharmacies stated:

> *"Relatively similar services in relation to purchasing but different in relation to marketing and support services."*[251]

> *"Yes, they do. They are very different services."*[252]

> *"The Symbol Groups have a greater involvement in the day to day running and decision making in their pharmacies."*[253]

[250] United Drug Response to Information Request, Q20 saved as "2022.08.22 CCPC 01.07.22- 22.08.22 Non-confidential_Redacted".

[251] Pharmacy 11, Response to the Commission's second questionnaire, saved as "2022.07.04 Note of the call with Pharmacy 11 D.01_Redacted.pdf".

[252] Pharmacy 30, Response to the Commission's second questionnaire, saved as "Call note with Pharmacy 30_Redacted".

[253] Pharmacy 6, Response to the Commission's second questionnaire, saved as "Pharmacy 6 Response Second Questionnaire_Redacted.pdf".

Market for buying group services

3.32 The Commission has taken the Parties' overlap in the provision of buying group services to retail pharmacies as the starting point for identifying the relevant product market(s) in respect of such services. In Section 2 of this Determination, the Commission has discussed the range of services offered by buying groups (paragraphs 2.22, 2.23, 2.38 and 2.53). The Commission has summarised evidence provided by the Parties in response to the Phase 2 RFI regarding services offered by buying groups in Table 1 below:

Table 1: Overview of services offered by buying groups.

	LinkUp	LinkUp Gold	Axium	Pharma Le Chéile	Pharmax	IndegoPlus
Negotiated discounts						
Manufacturer Funded Discounts (Branded & Generic POHPPs)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
OTC Manufacturer Funded Discounts	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
FOS Manufacturer Funded Discounts	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Technology & Business Reporting						
Central IT Order Platform	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Centralised Product & Price File Management	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Business Intelligence & KPIs	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Advisory Support						
Relationship Manager	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Other Services						
Staff & Product Training	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
PCRS Claims Support	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Standard Operating Procedures (*"SOPs"*)	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

PSI Dispensary Audit Readiness	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Category Management	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Range & Space Planning	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Visual Merchandising	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

*[redacted]

Source: Commission analysis of information provided by Uniphar.[254]

3.33 The Parties have noted that not all services are offered by all buying groups, and some services may be offered for an additional fee on top of the monthly membership fee.[255] The Parties have expressed a view that the provision of buying group services has evolved from providing a core service of negotiating discounts for members, to the current situation where a buying group may provide a broader range of retail services as shown in Table 1.[256]

Demand side substitution

3.34 In accordance with its Merger Guidelines, the Commission begins by considering demand side substitution, that is whether a purchaser of buying group services would consider alternative services to be a close substitute for buying group services, such that they would switch to an alternative service and render a price increase in buying group services unprofitable.

3.35 The market would be wider than the provision of buying group services to retail pharmacies if it could be shown that there are sufficient demand side substitutes for buying group services. This would be the case where a customer would consider other services to have sufficiently similar characteristics, functionality and pricing such that they would be willing to switch to alternatives in response to a SSNIP or equivalent decrease in quality of service.

[254] Uniphar Response to Phase 2 RFI, Q7.

[255] Uniphar Response to Phase 2 RFI, Q7.

[256] Uniphar Response to Phase 2 RFI, Q2.

<u>Are other services offered to retail pharmacies (for example CMB services) part of a potential buying group services market?</u>

3.36 The Parties noted in their responses to the Phase 1 RFI and the Phase 2 RFI that there are various ways in which retail pharmacies may seek to obtain discounts from manufacturers. As noted above, the Parties extended this view in the Written Response to consider that *"the appropriate competitor set"* for buying groups services would include different types of buying groups (such as *"commercial buying groups"* and *"collective buying groups"*), symbol groups, and direct sales from manufacturers and parallel importers. The Parties also included common-ownership groups in the appropriate competitor set but suggested this applied *"to a lesser extent."*[257]

3.37 However, the question for market definition is not purely whether alternative ways to negotiate discounts exist, but rather whether a purchaser of buying group services would switch to purchase an alternative service in response to a SSNIP in buying group services. As the Commission has described in Section 2, retail pharmacies have alternative routes to negotiate discounts other than buying groups, and a retail pharmacy would typically employ more than one of these routes, and indeed a combination of routes. This is the case both for retail pharmacies that purchase buying group services and retail pharmacies that do not.

3.38 The Commission has considered the extent to which alternative methods of negotiating discounts constrain providers of buying group services in its assessment of competitive effects in Section 5 below. The existence of alternative means of negotiating discounts does not in itself indicate that purchasers of buying group services would switch to all or any of these methods of negotiating

[257] Written Response, paragraph 6.3.

discounts in response to a SSNIP or equivalent decrease in quality in buying group services.

3.39 The Commission notes that in the Merger Notification Form[258] and in the Economics Report[259] the Parties proposed that there was a potential market for the provision of buying group services to retail pharmacies that was distinct from the provision of other services, including those other services that form part of the Proposed Transaction such as the provision of CMB services.

3.40 In considering how it expects demand for buying group services to evolve over the next 5 years, Uniphar stated in its Phase 2 RFI response that:

> "[redacted]"[260]

3.41 The Commission's assessment is that a potential market for the provision of buying group services should not include other services provided to retail pharmacies, such as CMB services. On the demand side, a retail pharmacy wishing to purchase buying group services (whose main purpose is the negotiation of discounts from manufacturers, and which may include some or all of the services listed in Table 1 above), would not find CMB services to be a close substitute, and would not switch to obtaining discounts through a CMB provider for the following reasons:

[258] Merger Notification Form, section 5.1.

[259] Economics Report, p. 7.

[260] Uniphar Response to Phase 2 RFI, Q3.

a) The services are functionally different and CMB services include many elements that a retail pharmacy interested in obtaining discounts does not require and may not be prepared to accept. As described in Section 2, buying group services focus on the negotiation of discounts on behalf of the members, and may include other services such as the operation of technology platforms associated with ordering, supply chain management and business analytics. CMB services include (in addition to some or all of those services) branding and store design, and management functions such as marketing, business intelligence and reporting, and HR. While including a range of services, the core aspect of CMB services is the common branding and store design, and related services such as brand-related marketing.[261] CMB services are therefore not a functional substitute for buying group services, but comprise a larger range of services of which negotiating discounts with manufacturers is only one.

The Frontier Report includes a table headed *"Services provided by market players"* that illustrates this point well. The ability to negotiate manufacturer-funded discounts is shared by different types of buying group, by *"symbol groups"* and by common-ownership groups. Retail pharmacy support services may be offered by some types of buying group, by symbol groups and by common-ownership groups. However, the provision of common management and branding services is not offered by any type of buying group. It is offered only by symbol groups and common-ownership groups.[262]

[261] Uniphar noted that the goal of all symbol brands is to develop a national retail brand for independent pharmacies. Consequently, the development of a common brand is the core aspect of CMB services. See Uniphar Response to the Phase 2, Q35.

[262] Frontier Report, Table 2.

b) The pricing structure for pharmacies purchasing buying group services and pharmacies purchasing CMB services is significantly different. According to the Parties:

"Monthly membership fees for the five best known commercial buying groups range from €[redacted] *(*[redacted] *and*[redacted] *to €*[redacted] *per month (*[redacted]*) and have remained the same for many years and almost certainly since the buying groups were set up."*[263]

As for pharmacies purchasing CMB services, the Commission has detailed the different pricing structures in paragraph 2.69-2.70 above, where the charge for CMB services may include a monthly fee or a percentage of revenue. According to the Parties, both of Uniphar's CMB providers, *Life Pharmacy* and *Allcare*, [redacted][264] Even if the CMB service fee includes the provision of buying group services, this fee is significantly higher than the monthly fee for membership of a buying group. Furthermore, and as discussed in paragraph 2.70 above, retail pharmacies incur refit costs when joining a CMB provider that are far in excess of buying group membership fees. Therefore, a purchaser of buying group services would not be likely to find CMB services to be a close substitute on the basis of price. In the Commission's view, the difference in the price of monthly membership between a CMB provider and a buying group and the significant investment costs associated with rebranding mean that it is unlikely that a pharmacy purchasing buying group services would switch to purchase CMB services in response to a small increase in the price of buying group services, and so CMB services would not be in the same market as buying group services. As the Parties have noted*:*

[263] Supplementary Economic Report, p. 22.

[264] Uniphar document "*Symbol Model Comparisons – Internal Review.pptx.PPTX*", slides 1-2, Uniphar Response to Phase 1 RFI.

"In response to the evolution in their customer's needs, buying groups will continue to expand and enhance the range of retail support services which they offer. In doing so, the bundles of services which the buying groups provide will edge ever closer to the bundles of services which the symbol groups provide, increasingly blurring the distinction between these two models. <u>However, it is worth noting that buying groups are limited in their ability to provide the full suite of services given the necessity for common branding.</u> For example, in order to be able to operate digital solutions (loyalty, e-commerce sites, patient apps and online doctor services) in a cost effective and efficient manner, common branding and scale is required. As a result, independent pharmacies will continue to look to symbol groups as a more cost-effective value for money solution. A further limitation in the buying group services model is the inability to run national advertising campaigns and broader in store promotional campaigns that drive patient and consumer engagement and patient loyalty. In a growing digital world, this is becoming more critical."[265]

3.42 Frontier's position that *"[a]lternatives, such as manufacturers, parallel importers, and CMB providers, are sufficiently close substitutes to be considered direct constraints for buying groups"* has already been noted in paragraph 3.28 above. However, in relation to buying groups, the Frontier Report indicates that switching predominantly takes place between buying groups, with [redacted]% of Axium customers who left between 2019 and 2022 switching to another buying group, and [redacted]% of LinkUp Gold members who left between 2019 and 2021 switching to another buying group.[266]

[265] Uniphar Response to Phase 2 RFI, Q3. Emphasis added.

[266] Frontier Report, paragraphs 46 and 47.

3.43 No evidence was submitted by the Parties indicating switching between one of buying group services, CMB services or self-supply as a response to changes in prices.

3.44 The Commission therefor concludes that, on the demand side, the market for the provision of buying group services does not include the provision of other retail services such as CMB services. The Commission does not consider that the Parties' view of a "wider competitor set" indicates that the market should be wider than the provision of buying group services. However, the extent to which other services constrain the provision of buying group services is discussed further in Section 5 in the context of the analysis of competitive effects.

Is self-supply part of a potential buying group services market?

3.45 The Commission considers the extent to which a retail pharmacy customer would switch to self-supply buying group services in response to a SSNIP or equivalent decrease in quality of service in buying group services. The Commission notes that, as set out in paragraph 3.26, the Parties did not include self-supply in their *"wider competitor set."*

3.46 However, Frontier has suggested that:

> *"[I]f a buying group was to increase prices/reduce discounts to pharmacies for certain products, then pharmacies could easily switch a significant proportion of volumes from buying group services to both either parallel importers (typically for branded products) or direct from manufacturers (for generics and for some branded products, in the latter case with full-line wholesalers fulfilling the order)."*[267]

3.47 While the Commission understands that retail pharmacies can, and do, purchase some drugs directly from manufacturers and short-line wholesalers/parallel importers, as well as negotiating directly with manufacturers and short-line

[267] Frontier Report, paragraph 51.

wholesalers, this is not the same as self-supplying buying group services. A retail pharmacy may well supplement the services it receives as part of a buying group by purchasing some drugs directly, but this is typically done in addition to the retail pharmacy's purchase of buying group services and not as a substitute for same.[268] While retail pharmacies have the option to purchase and/or negotiate directly with manufacturers and short-line wholesalers/parallel importers, engaging with each individual supplier would require significant resources. Accord noted:

> *"that it would be difficult nowadays for an individual retail pharmacy to negotiate deals with each generic supplier because of how quickly the market continues to change. Products fluctuate in and out of stock and as a result it would be a full-time job in itself.* [Accord] *stated this is why pharmacies tend to pay a subscription fee to a buying group".*[269]

3.48 Switching data provided by Uniphar shows between 2018 and 2021, out of [redacted] retail pharmacies to leave either LinkUp and/or LinkUp Gold, [redacted] retail pharmacies left to become 'standalone' pharmacies (did not join another group and are presumed to engage directly with manufacturers and short-line wholesalers/parallel importers). Of the [redacted] retail pharmacies that left Axium between 2019 and 2022, [redacted] did not join another buying group and are presumed

[268] In the First Pharmacy Questionnaire retail pharmacies were asked "In 2021, what percentage of your pharmacy-only human pharmaceutical products (by volume) did you purchase: (i) from your primary full-line wholesaler; (ii) from your secondary full-line wholesaler; (iii) directly from manufacturers; and (iv) from short-line wholesalers?" Most of the pharmacies which responded indicated that they purchased a minority of their POHPPs directly from manufacturers and short-line wholesalers. The Commission understands that retail pharmacies can purchase POHPPs from a full-line wholesaler while negotiating a discount directly with the relevant manufacturer, and that the question asked of pharmacies does not capture this direct negotiation. Paragraph 2.18 above addressed direct pharmacy-manufacturer price negotiation.

[269] Accord Call Note, dated 29 June 2022. The Commission notes that Accord represents 2.39% of the market for the supply of POHPPs in the State. Seven of the eight manufacturers contacted by the Commission had a market share of less than 4% in the supply of POHPPs. According to the parties, Accord is also one of seven generic manufacturers in the State (paragraph 5.11 of the Written Response) and according to Accord they are either the second or third largest generic manufacturer. The Commission contacted these specific manufacturers as they were provided by the Parties in the Merger Notification Form as being in the top 25 suppliers used either one or both of the Parties for the operation of a buying group for retail pharmacies.

to engage directly with manufacturers and short-line wholesalers/parallel importers.[270]

3.49 Additionally, even if a pharmacy was able and willing to negotiate individually, this may not be an option for purchasing all of the POHPPs that it requires.

3.50 The Parties have noted:

> *"A buying group is an outsourcing by a pharmacy of its supplier negotiation activities in order to achieve efficiencies and gain buying power. The premise of a buying group is the use of collective buying power to negotiate an improved discount for a group of purchasers on stock which they require for their business."*[271]

3.51 The Commission notes that independent pharmacies are, in most instances, unlikely to be able to individually get the same level of discount negotiating by themselves as buying groups will achieve when negotiating on behalf of a group of pharmacies, due to not being able to achieve the same levels of volume. A single pharmacy is unlikely to be able to replace the collective buying power of a buying group. Further, the Commission has discussed in Section 2 the importance of volume in negotiating discounts with manufacturers. If it were the case that an individual retail pharmacy could readily switch to self-supply, it is difficult to see how an individual retail pharmacy could offer manufacturers comparable levels of volume.

3.52 Third parties explained this as follows:

> *"…. there is not enough time for Menarini to negotiate with some of the smaller buying groups. The way that Menarini currently approach negotiations means that they talk to approximately 20-25% of people but can reach 70-75% of the market that way.* [Menarini] *stated that in the*

[270] NaviCorp Response to Phase 2 RFI, Q10.

[271] NaviCorp Response to Phase 2 RFI, Q2.

interest of time, Menarini deals with the bigger buying groups and bigger retail groups as there just is not enough time to engage with true independents or smaller groups of 5/6 pharmacies."[272]

"….it would be difficult nowadays for an individual retail pharmacy to negotiate deals with each generic supplier because of how quickly the market continues to change. Products fluctuate in and out of stock and as a result it would be a full-time job in itself. [Accord] *stated this is why pharmacies tend to pay a subscription fee to a buying group."*[273]

3.53 While the negotiation of discounts is a key feature of buying group services, it is not the only feature. For example, in describing the different services that Axium offers to its buying group members, the Parties have identified [redacted] types of service in addition to negotiating discounts with suppliers.[274] A pharmacy purchasing buying group services would not necessarily have the resources or skillset to go about engaging in separate negotiations for its requirements that are currently met by a buying group. This is a resource-intensive process. The Commission notes that the Parties have not provided evidence suggesting that self-supply should be in the same product market as buying group services.

3.54 For all of these reasons, the Commission's conclusion is that self-supply is not part of the same market as buying group services. The Commission would expect that retail pharmacies can self-supply some elements of buying groups services on the margins, but not to the extent that a retail pharmacy purchasing buying group services would find self-supply to be a close substitute. The Commission further

[272] Menarini Call Note, dated 30 June 2022, p. 2, saved as "2022.06.30 Call with Menarini_Redacted". The Commission notes that Menarini represents 0.8% of the market for the supply of POHPPs in the State, according to IQVIA data provided by the Parties in its Written Response. Seven of the eight manufacturers contacted by the Commission had a market share of less than 4% in the supply of POHPPs. The Commission contacted these specific manufacturers as they were provided by the Parties in the Merger Notification Form as being in the top 25 suppliers used either one or both of the Parties for the operation of a buying group for retail pharmacies.

[273] Accord Call Note, dated 29 June 2022, p. 2, saved as "CCPC Call Note - CCPC and Accord Healthcare - Redacted".

[274] NaviCorp Response to Phase 2 RFI, Q2.

considers self-supply as a potential competitive constraint in the market for the provision of buying group services in the discussion of competitive effects in Section 5.

Are services offered by common-ownership groups part of a potential buying group services market?

3.55 The Commission has considered the extent to which a pharmacy purchasing buying group services would find services offered by a common-ownership groups such as *Boots* or *McCabes* to be a close substitute. The Commission notes the Parties' views expressed in paragraph 3.26 that common-ownership groups form part of the *"competitor set"* in respect of buying groups services but *"to a lesser extent."* The Commission's view is that a pharmacy purchasing buying groups services would not find common-ownership services to be a close substitute for buying group services. Although services offered by the common-ownership groups may be similar to those offered by buying groups, their purchase would entail the pharmacy becoming part of that chain of pharmacies. Buying group services offered by chains are only available to retail pharmacies that are owned by the chain – the services are only available to members of the common-ownership groups. For an independent pharmacy to switch to purchase buying group services from a common-ownership groups, the pharmacy would need to give up its independent status and sell its pharmacy to the common-ownership groups, and would thus no longer operate as an independent pharmacy. The Commission notes that the Parties have not provided evidence that shows pharmacies switch to common-ownership in response to price changes in buying group services. The Commission further considers common-ownership groups as a potential competitive constraint in the market for the provision of buying group services in the discussion of competitive effects in Section 5.

3.56 The Commission's conclusion is that services offered by common-ownership groups are not in the same product market as buying group services.

Should the potential market for the provision of buying group services be further segmented?

3.57 The Commission notes that, while the Parties have suggested post-submission of the Merger Notification Form that there may be distinctions between different categories of buying groups within a potential market for buying group services, (for example, the Parties refer to different categories of buying groups such as *"commercial buying groups"* or *"collective buying groups"*, and *"a la carte"* or *"compliance-based"* buying groups)[275] the Parties have not provided evidence suggesting that such distinctions warrant the finding of separate product markets.

3.58 Nonetheless, for completeness, the Commission has considered whether the potential market for buying group services should be further segmented. This could arise, for example, where there are differences within the potential market for buying group services in demand or supply by different customer groups, or if the conditions of demand and supply differ for different services within the market for buying group services.

3.59 In its assessment of the extent to which the market for buying group services should be further segmented, the Commission considered the following:

a) While there is variation in the set of services offered by different buying groups, as illustrated in Table 1 above, there is sufficient coalescence around a common set of services to identify a potential market. Indeed, the Parties have at various points in their submissions defined a separate market for buying group services and have been able to list the participants in this potential market;[276]

b) In considering the different categories of buying groups used by the Parties (as detailed in paragraphs 2.24-2.28 of Section 2), the

[275] Uniphar Response to Phase 2 RFI, 'Buying Groups', pp. 3-5. See paragraphs 2.24 – 2.28 of Section 2.

[276] See: Merger Notification Form, paragraph 5.1; Economics Report, p. 9, Annex 7.3(a) to the Merger Notification Form; Uniphar Presentation "32147863_1(Uniphar Lima CCPC May 4 CONFIDENTIAL).PPTX", dated 4 May, slides 15-16, NaviCorp Response to Phase 1 RFI, Q8 and 10.

Commission's view is that a customer purchasing buying group services from an *"a la carte"* buying group could readily switch to purchase buying group services from a *"compliance-based"* buying group and, to a lesser extent, vice versa. Indeed, evidence submitted by the Parties shows pharmacies which switched from LinkUp, an *"a la carte"* buying group, to Axium, a compliance-based buying group.[277] Although the business model of the two types of buying group may differ, the services provided to the retail pharmacy customer are similar. This indicates that there is likely to be a single market for buying group services that does not need further segmentation;

c) The Commission's view is that the buying groups described by the Parties as *"collective buying groups"* (for example, Pharma Alliance and Chemco) are not buying groups but rather akin to common-ownership groups in their structure and way of operating;[278]and,

d) The Commission has not seen any evidence of any particular specialisation in any subset of services. This makes it difficult to envisage what sort of segmentation could occur.

3.60 The Commission's conclusion is that further segmentation of the market is unwarranted and would make little or no material difference to the analysis of competitive effects. The Commission notes that the Parties have not suggested that different models of buying group constitute separate product markets. For this reason and for the other reasons discussed above, the Commission's conclusion is that the market for the provision of buying group services does not need to be further segmented.

[277] Uniphar document, "*LinkUp Leavers.xlsx*", Uniphar Response to Phase 2 RFI, Q10.
[278] See paragraph 2.28.

Supply side substitution

3.61 While the boundaries of the relevant product market are generally determined by reference to demand-substitution alone,[279] for completeness the Commission has considered the extent to which a supplier not currently offering buying group services to retail pharmacies would switch to offer such services in response to a SSNIP in buying group services. For the purposes of market definition, the Commission considers that supply side substitution would involve a supplier responding to a price increase in buying group services promptly and without significant costs to switch its supply to provide buying group services.[280]

3.62 The Commission's view is that a supplier of an alternative service to retail pharmacies would not be able to switch promptly and without significant costs to supply buying group services. For example, as noted in Section 2, retail pharmacies may purchase some of their POHPPs from short-line wholesalers. However, a short-line wholesaler would be unlikely to switch to provide buying group services because of the time and investment required. This would include, for instance, the costs of *inter alia* developing or purchasing a technology platform.[281]

3.63 There is one example of a CMB provider entering the market for the provision of buying group services. Indepharm (a CMB provider) launched IndeGo Plus (a standalone buying group service) in 2020. The Commission understands that after its two years of operation, IndeGo Plus has five customers. In addition, there are no further CMB providers who do not currently also offer buying group services and could conceivably follow suit. As a result, given the Commission will set out SLC concerns in relation to both markets in Section 5, the Commission's views on the competitive impact of the Proposed Transaction are not dependent on

[279] Merger Guidelines, paragraphs 2.15 and 2.16.

[280] The approach to supply-side substitution in market definition is distinct from the approach to the analysis of potential competition carried out in section 5.

[281] The Commission understands that Axium initially used a manual ordering process before developing its own technology platform.

whether the competitive effects of the Proposed Transaction fall to be assessed by reference to a broader single relevant product market for both buying group services and CMB services; or with reference to narrower separate and distinct relevant product markets for each.

3.64 The Commission's view is that a supplier of an alternative service to retail pharmacies that is not already providing buying group services would not be able to switch promptly and without significant costs to supply buying group services. The extent to which supply of alternative services to retail pharmacies constrains providers of buying group services is discussed further in the context of barriers to entry and expansion in Section 5.

Market for CMB services

3.65 The Commission has set out its view in paragraph 3.44 above that there is a market for buying group services that does not include CMB services. The Commission now considers whether there is a market for CMB services.

3.66 The Commission has discussed CMB services in Section 2, from paragraphs 2.67 to 2.80. CMB services always include common branding, and may also include services such as store design, marketing, business intelligence and reporting, procurement, HR management, IT management, and accounting. CMB services may include some of the services offered by buying groups, and in certain cases, subscribers to CMB services will be part of an affiliated buying group.

3.67 The Commission has analysed evidence provided by the Parties regarding services offered by providers of CMB services, as summarised in Table 2 below:

Table 2: Overview of services offered by providers of CMB services

	Life Pharmacy	Allcare	StayWell	CarePlus	CommCare (totalhealth + Haven)	Pure
Negotiated discounts						

Manufacturer Funded Discounts (Branded & Generic POHPPs)	■	■	■	■	■	■
OTC Manufacturer Funded Discounts	■	■	■	■	■	■
FOS Manufacturer Funded Discounts	■	■	■	■	■	■
Tech & Bus. Reporting						
Central IT Order Platform	■	■	■	■	■	■
Discounted 3rd Party License Fees	■	■	▮	▮	▮	▮
Centralised Product & Price File Management	■	■	■	■	■	▮
Business Intelligence & KPIs	■	■	■	■	■	▮
Peer Benchmarking	■	■	■	■	▮	▮
Patient App	■	■	▮	■	■	▮
Click & Collect	■	■	▮	■	■	▮
Advisory Support						
Relationship Manager	■	■	■	■	■	▮
Other Services						
Staff & Product Training	■	■	■	■	■	▮
PCRS Claims Support	■	■	■	■	■	▮
SOPs	■	■	▮	■	■	■
PSI Dispensary Audit Readiness	■	■	▮	■	■	■
Category Management	■	■	■	■	■	■
Range & Space Planning	■	■	■	■	■	■
Promotional Calendar	■	■	■	■	■	■
Visual Merchandising	■	■	■	■	■	■

Local Marketing	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Digital Marketing	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
National Marketing	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Loyalty Schemes/Cards	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Store Fitout Project Management	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
HR	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Finance & Reporting	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

**Available at an additional cost*

Source: Commission analysis of information provided by [redacted] [282]

3.68 In the Merger Notification Form, the Parties set out their view as follows:

> *"Such services comprise various elements including brand support, project management, procurement of POHPPS from wholesalers, development of new services and ranges of POHPPS, planogram design, stock management, category and planning management, property management, HR management, IT management, marketing support/assistance and financial/accounting services."*[283]

Demand side substitution

3.69 In accordance with its Merger Guidelines, the Commission begins by considering demand side substitution, that is whether a purchaser of CMB services would consider alternative services to be a close substitute for CMB services, such that they would switch to an alternative service and render a price increase in CMB services unprofitable.

3.70 In paragraph 3.26, the Commission noted the Parties' view that self-supply, CMB providers and common-ownership groups may form a single market. In principle,

[282] Uniphar Response to Phase 2 RFI, Q7.

[283] Merger Notification Form, section 5.1.

a market could be wider, if customers considered other services to have sufficiently similar characteristics, functionality and pricing such that they would be willing to switch to alternatives in response to a SSNIP or equivalent decrease in quality of CMB services.

3.71 The Commission has already concluded that CMB services are not in the same product market as buying group services, and has provided evidence including, but not limited to, differences in functionality and pricing in support of this view.[284] The Commission's reasoning holds also when considering whether a purchaser of CMB services would be likely to switch to purchase buying group services in response to an increase in the price of CMB prices. Although the purchaser of CMB services may be able to substitute some elements of the CMB service by purchasing buying group services and perhaps by self-supplying other services, the functional differences between the two types of service and the costs associated with replacing or removing branding indicates that a purchaser of CMB services would not switch to a provider of buying group services, and self-supply the remaining services, in response to a SSNIP or an equivalent decrease in the quality in CMB services.

3.72 The Commission has noted in paragraph 3.29 above Frontier's position that: *"the evidence in the Assessment shows that the majority of switching takes place between business models rather than within business models. A market definition where more switching takes place to firms outside the market than within the market does not make sense…"*.

3.73 However, in relation to CMB services, the Commission understands that competition between symbol groups takes place at the recruitment stage, and that the financial costs of refitting and branding makes switching between symbol groups unviable for pharmacies.[285]

[284] See paragraph 3.41(a-b) above.

[285] See paragraph 5.342-5.346 below, and paragraph 2.70 above.

3.74 The Frontier Report shows that, between 2019 and 2022, [redacted] of those customers of NaviCorp and Uniphar who switched away from its provision of CMB services either switched to a common-ownership group or switched to be independent without membership of a CMB services provider.[286] [redacted]% of switchers moved to common-ownership. This, by definition, involved the pharmacy owner selling the pharmacy or becoming a shareholder in the common-ownership group. As considered further below, the Commission does not consider ceasing to operate as an independent pharmacy to be in the same market as CMB services.

3.75 The other [redacted]% of pharmacies who switched away from CMB services switched to become independent pharmacies. The Commission considers further below whether self-supply is in the same market.

3.76 As noted above, no evidence was submitted by the Parties indicating switching between one of buying group services, CMB services or self-supply as a response to changes in prices.

<u>Is self-supply in the same market as the provision of CMB services?</u>

3.77 The Commission has considered the extent to which a retail pharmacy would switch to self-supply CMB services in response to a SSNIP or equivalent decrease in quality of service in the provision of CMB services. The Commission notes that, as set out in paragraph 3.26, the Parties have stated that self-supply is in the same *"competitor set"* as the provision of CMB services.[287]

3.78 While the Commission understands that there are retail pharmacies that can, and do, self-supply branding and management services, this does not necessarily mean that a pharmacy purchasing CMB services would find self-supply to be a close substitute.

[286] Frontier Report, Figures 9 and 10.

[287] Written Response, paragraph 6.4.

3.79 In order to switch to self-supply, a pharmacy purchasing CMB services would need to give up its common branding and potentially modify its store to remove its branding. It would need to develop or source its own internal systems to replace the management functions provided as part of its CMB services. It would need to consider the investment it has already made in CMB services. For example, the Parties have estimated that the cost of branding can vary from €[redacted]-€[redacted] depending on the size of the pharmacy and the level of work required to the store.[288]

3.80 The Commission notes that the provision of CMB services includes the supply of a suite of services. In addition to common branding, the Parties have stated that:

> *"All symbol brands have invested heavily in systems to streamline activities surrounding central databases, central product and price file management and real time sales reporting. Symbol brands also now have a suite of digital solutions, (patient apps, loyalty programmes, e-commerce capabilities) and more advanced business intelligence and reporting tools. As part of developing the symbol brand support network, symbol brands have invested heavily in head office teams across a range of disciplines from buying, operations, regulatory marketing, digital, HR and finance."*[289]

3.81 The Commission recognises that the services included in the suite of services offered by CMB providers could be assembled from a range of different suppliers, such that the retail pharmacy could construct its own suite of services. However, for the purposes of market definition, there would need to be evidence of customers being able to do this quickly and without incurring significant costs. The Commission has not seen such evidence, and considers that there would be significant costs involved in a pharmacy purchasing CMB services switching to self-

[288] Uniphar Response to Phase 2 RFI, Q 35.

[289] Uniphar Response to Phase 2 RFI, Q 38.

supply. The Commission's conclusion is that self-supply is not part of the same market as CMB services. However, the Commission further considers self-supply as a potential competitive constraint in the market for the provision of CMB services in its assessment of competitive effects in Section 5.

<u>Are services offered by common-ownership groups in the same market as CMB services?</u>

3.82 The Commission has considered the extent to which a pharmacy purchasing CMB services would find services offered by a common-ownership group such as *Boots* or *McCabes* to be a close substitute. The Commission notes the Parties' views expressed in paragraph 3.26 that common-ownership groups form part of the *"competitor set"* in respect of CMB services but *"to a lesser extent."* The Commission's view is that a pharmacy would not find common-ownership services to be a close substitute for CMB services, because although services offered by common-ownership groups may be similar to those offered by the providers of CMB services, their purchase would entail the customer becoming part of that chain of pharmacies. CMB services offered by chains are only available to retail pharmacies that are owned by the chain – the services are only available to members of the common-ownership group. For an independent pharmacy to switch to purchase CMB services from a common-ownership group, the pharmacy would need to give up its independent status and sell its pharmacy to the common-ownership group, and would thus no longer operate as an independent pharmacy.

3.83 The Commission's conclusion is that services offered by common-ownership groups are not in the same product market as the provision of CMB services.

Supply side substitution

3.84 While the boundaries of the relevant product market are generally determined by reference to demand-substitution alone,[290] for completeness the Commission has considered the extent to which a supplier not currently offering CMB services to retail pharmacies would switch to offer such services in response to a SSNIP in CMB services. For the purposes of market definition, the Commission considers that supply side substitution would involve a supplier responding to a price increase in CMB services promptly and without significant costs to switch its supply.[291]

3.85 The Commission's view is that a supplier of an alternative service to retail pharmacies would not be able to switch promptly and without significant costs to supply CMB services.

3.86 For example, the differences between buying group services and CMB services are sufficiently distinct such that a provider of buying group services would not be likely to quickly switch to supply CMB services (where it is not already doing so). The costs incurred when establishing a symbol group have been discussed in paragraphs 2.81-2.85. Similarly, the Commission's engagement with common-ownership groups indicated they are unlikely to quickly switch supply to CMB services (where it is not already doing so).[292] Indeed, such a switch would undermine the common-ownership groups' business model. For example, *Pure*, a common-ownership group which provides CMBs to two retail pharmacies, noted that:

> *"the franchise side of Pure is more of a "side-show", and that the main rate of growth is within the core shareholding pharmacies*. [Pure] *stated*

[290] Merger Guidelines, paragraph 2.15.

[291] The approach to supply-side substitution in market definition is distinct from the approach to the analysis of potential competition carried out in section 5.

that this aspect of the business was setup to see whether it might take off, and has not seen a particularly high level of growth over the past few years".[293]

3.87 In an email to the Commission, McCabes, a common-ownership group, noted that:

"[redacted]".[294]

3.88 The Commission's conclusion is that a supplier of an alternative service to retail pharmacies would not be able to switch promptly and without significant costs to supply CMB services.

Conclusion on the relevant product markets

3.89 The Commission's conclusion is that the relevant product markets are for:

- The provision of buying group services; and
- The provision of CMB services.

3.90 The Commission notes that this is consistent with the Parties' view as set out in the Merger Notification Form.

Relevant geographic markets

Views of the Parties

[293] *Pure* Call Note, dated 16 June 2022, p. 1, saved as "2022.06.16 Call with CCPC - non-confidential_Redacted.

[294] McCabes email to the Commission, 4 November 2022.

3.91 In the Merger Notification Form, the Parties stated that in each product market they had identified (i.e., the supply of common management/branding services to retail pharmacies; operation of a buying group for retail pharmacies; and the wholesale supply of POHPPs) the geographic market is the State.[295]

3.92 In their Written Response, the Parties stated that they considered the geographic scope of the markets discussed in the Written Response to be the State.[296]

Views of the Commission

3.93 The Commission's view is consistent with the view of the Parties that the geographic market for all identified product markets is national in scope.

3.94 The Commission has seen no evidence to suggest that a finding of narrower, subnational markets would be warranted. Given differences in competitive conditions between jurisdictions, the Commission considers that a finding of a wider cross-border market would not be appropriate.

Overall conclusion on relevant market definition

3.95 Having regard to the evidence available to it, the Commission's conclusion is that the relevant markets (*"Relevant Markets"*) for the competitive assessment of the Proposed Transaction are:

- The provision of buying group services in the State; and
- The provision of CMB services in the State.

[295] Merger Notification Form, section 5.1.

[296] Written Response, paragraph 6.22.

4. RELEVANT COUNTERFACTUAL

Introduction

4.1 The SLC test in section 22(3) of the Act requires an assessment of the effects of a merger or acquisition on the state of competition in a relevant market. In assessing the likely effects of a merger on competition, the Commission, as in the present case, typically compares the situation that may be expected to arise following the merger with that which would have prevailed without the merger. The market situation without the merger is often referred to as the *"counterfactual"*. The Commission generally adopts the prevailing conditions of competition as the counterfactual against which it assesses the impact of the merger.[297]

4.2 The Commission's Merger Guidelines state that:

> *"The term 'counterfactual' refers to the state of competition without the merger or acquisition. In other words the "actual" situation is the merger being put into effect and the "counterfactual" is the situation in the absence of the merger being put into effect. The counterfactual provides the reference point, or the point of comparison, for assessing competitive effects arising from a merger."*[298]

4.3 Paragraph 1.15 of the Commission's Merger Guidelines states the following:

> *"The Commission will consider all available evidence to decide on the relevant counterfactual. In doing so the Commission will assess the credibility of a counterfactual proposed by the merging parties to ensure accurate identification of the relevant counterfactual. In particular, the Commission will expect the merging parties to substantiate any counterfactual they propose with objective evidence supported, where*

[297] See paragraph 1.14 of the Merger Guidelines.

[298] See paragraph 1.12 of the Merger Guidelines.

> *necessary, by independent expert analysis. Such evidence and analysis should obviously be consistent with the parties' own internal pre-merger assessments of the likely counterfactual."*

4.4 Inevitably there is a degree of uncertainty as regards hypothetical future events, and the Commission will consider all the evidence adduced by the parties in the context of an assessment as to whether there is likely to be an SLC in the future. The Commission must ultimately ask itself whether it is satisfied on the balance of probabilities that there will be an SLC caused by the merger. The Commission is, however, not under an obligation to make findings of fact (whether on a balance of probabilities basis or otherwise) in respect of each item of evidence. Nor is it obliged to find that any particular potential event is more likely than not to occur before it can take it into account in its overall assessment of the probability of SLC.

4.5 Paragraph 1.19 of the Commission's Merger Guidelines states, under the heading *"Evidence"*:

> *"The Commission's review of a notified merger or acquisition is evidence-based. This means that the Commission requires sufficient reliable evidence from the merging parties regarding the likely competitive effects of the merger. This is particularly important when the parties wish to present merger defence arguments (i.e., arguments to counter competition concerns). The most common of such arguments include ease of entry, countervailing buyer power, efficiencies and the failing firm."*

4.6 Paragraph 9.8 of the Commission's Merger Guidelines states *"[i]n particular, documents prepared prior to, or unrelated to, the proposed transaction will provide useful evidence of intentions to exit."* While this statement is made in the specific context of *"Failing Firms and Exiting Assets"*, this statement, together with that in paragraph 1.15 of the Commission's Merger Guidelines, recognises that pre-merger documents will be more probative and relevant for the Commission's consideration of the relevant counterfactual. That is, the Commission places more weight on documents prepared prior to the merger being in contemplation. This is because such documents are more likely to demonstrate an intention on the part of one or other of the parties (for example, the intention of shareholders to exit a firm or the intention for there to be an exit of a firm and its assets from the market) formed independently of the proposed transaction. However, once a proposed transaction is under contemplation, it becomes very difficult for the Commission to separate out such an intention in the absence of the merger from such an intention due to the merger.

4.7 The Commission sets out below:

a) Views of the Parties;

b) The Assessment, Written Response and Oral Response;

c) Views of third parties;

d) Proper approach to the counterfactual in the present case;

e) Views of the Commission; and

f) The Commission's conclusion.

Views of the Parties

4.8 No submission was made to the Commission by the Parties in the Merger Notification Form concerning the relevant counterfactual.

4.9 In response to the Phase 1 RFI, regarding the counterfactual, NaviCorp stated that:

"[redacted]"[299]

[299] NaviCorp Response to Phase 2 RFI, Q21.

4.10 In its response to the Phase 1 RFI, NaviCorp stated [redacted]

4.11 According to NaviCorp, following the approach from Uniphar:

> ‘[redacted]00

4.12 In response to the Phase 1 RFI, regarding the counterfactual, Uniphar stated:

> *“Accordingly, the competitive situation which would prevail but for the Proposed Transaction being put into effect does not differ greatly from the status quo.”*[301]

4.13 However, in the Supplementary Economics Report, an alternate counterfactual was proposed:

> *“The author understands that* [redacted] *Reasonable counterfactuals would appear to involve Uniphar in losing at least some of the Axium associated wholesaling throughput.”*[302]

The Assessment, Written Response and Oral Response

4.14 The Commission set out its provisional counterfactual in the Assessment. Its provisional finding was that, absent the Proposed Transaction, NaviCorp would remain in the market and the *status quo* would prevail. The prevailing conditions

[300] NaviCorp Response to Phase 1 RFI, Q20.

[301] Uniphar Response to Phase 1 RFI, Q43.

[302] Supplementary Economics Report, fn. 37.

of competition would be maintained and NaviCorp would remain an independent undertaking active in the Relevant Markets.

4.15 In the Written Response, the Parties claimed that the Commission had erred in its evaluation of the counterfactual. The Parties stated that:

> *"In the Assessment, the Commission cites Navi's response to the Phase 1 RFI submitted on 10 March 2022, i.e.* [redacted] *However, that statement was made over seven months ago. In a highly dynamic market such as pharmaceuticals, much can change in seven months. Furthermore, the economic and geopolitical climate have altered market conditions in the past seven months. The Commission must base its decision making on current and relevant facts."*[303]

4.16 In the Written Response and Oral Response, the Parties have argued that in its counterfactual the Commission should take into account the extent to which NaviCorp's shareholders' plans have changed since the time of notifying the Proposed Transaction. In the Oral Response, NaviCorp stated "[redacted]".[304] They have also argued that the counterfactual should take into account that the pharmaceuticals market is highly dynamic.[305]

4.17 In Annex 5 to the Written Response, NaviCorp made a confidential submission (*"NaviCorp Confidential Submission"*) on the counterfactual. This submission proposed that:

> "[redacted]

[303] Written Response, paragraph 7.4.

[304] Oral Response, Confidential Transcript, p. 4.

[305] Written Response, paragraph 7.4.

[redacted]

[redacted]

[redacted].”[306]

4.18 The NaviCorp Confidential Submission stated that:

“[redacted]”[307]

4.19 As these quotes demonstrate, the NaviCorp Confidential Submission contains some [redacted]. The NaviCorp Confidential Submission was submitted alongside the Written Response, and the Parties have noted that it was prepared some seven months after notification of the Proposed Transaction.[308]

[306] NaviCorp Confidential Submission, paragraph 2.1.

[307] NaviCorp Confidential Submission, paragraph 3.1.

[308] Written Response, paragraph 7.4.

4.20 NaviCorp, in its Oral Response, stated the following in relation to future investment in NaviCorp:

> "[redacted]"[309]

Views of third parties

4.21 The Commission received no third party views explicitly commenting on a counterfactual.

4.22 However, the Commission understands that, in parallel with their discussions with Uniphar, NaviCorp explored the possibility of [redacted] acquiring a 100% shareholding in NaviCorp.[310]

4.23 The Commission discussed with [redacted] their engagement with NaviCorp concerning the potential acquisition of NaviCorp. [redacted] confirmed that:

> *"…the NaviCorp opportunity was looked at in detail and there were potential synergies between the two businesses."*[311]

4.24 The Commission understands that discussions between NaviCorp and [redacted] ultimately ended in September 2021 when Uniphar demonstrated a firm interest in acquiring NaviCorp.[312]

[309] Oral Response, Confidential Transcript, p. 121.

[310] NaviCorp document "Discussion notes Aspen 16.04.21.docx", dated 16 April 2021, NaviCorp Response to Phase 1 RFI.

[311] [redacted]

[312] NaviCorp Response to Phase 1 RFI, Q 20. NaviCorp explained in their Phase 1 RFI response that [redacted] made a non-binding offer to acquire NaviCorp in April 2021 which was rescinded a week later as the [redacted] board "*require*[d] *further information before taking that step [and] want[ed] to gain a broader understanding of the Irish pharmacy market, how it works*". Discussions between [redacted] and NaviCorp were ongoing, although some meetings did not take place due to rescheduling issues.

Proper approach to the counterfactual in the present case

4.25 The Commission recognises that competitive conditions can and do change over time. The Commission accepts that it is important to take into account the potential for change in the market in order to consider as fully as possible the level and intensity of competition without the merger.

4.26 It is equally important, however, to distinguish between competitive conditions and other developments that would have happened irrespective of the Proposed Transaction (which should be taken into account as part of any counterfactual analysis) and those which are directly related to or the result of the Proposed Transaction (which are irrelevant to the counterfactual analysis).

4.27 Actions that are either directly related to or the result of a merger are disregarded for the following reasons:

a) First, the identification of a counterfactual involves a comparison between the competitive conditions that would result from the notified merger with the conditions that would have prevailed in the absence of the merger. Actions that are directly related to a merger or arise as a consequence of a merger would not have occurred in the absence of the merger. They are therefore irrelevant to the counterfactual assessment.

b) Second, in principle, actions taken by a merging party post-notification should not have the effect of altering the counterfactual or the assessment of an SLC. In particular, it is not open to any party to make decisions or take actions after notification, for example, altering the target undertaking's business, assets, or market strategy,[313] and then to argue that competition would be lessened regardless of the merger. Were it otherwise, a party would be able to take actions after notification that

[313] The Commission's views in this regard are consistent with those of the then-Chief Competition Economist's team at the Directorate General for Competition of the European Commission. See in particular, *Recent Developments at DG Competition: 2017/2018*, Review of Industrial Organization (2018) 53:653–679, pp. 672 – 678.

affect, or even determine, the outcome of the substantive assessment. As a matter of policy, the Commission considers that cannot be right.

c) Third, as set out in previous determinations[314], the Commission considers that its approach to the identification of a counterfactual is consistent with the decisional practice of the European Commission. For instance, in *GE/Alstom*, the Commission found that a *'recent deterioration of Alstom's financial situation in so far as it would not have occurred in the absence of the proposed merger cannot be taken into account'.*[315] The European Commission did not take into account the post-notification decline of the target as part of its counterfactual analysis in *GE/Alstom* because the decline was causally attributed to the merger.

d) Finally, there is a material difference between actions that are directly related to a merger and cases in which one of the parties to a merger is already failing. In the latter situation (which does not arise in the case of the Proposed Transaction), the pre-merger conditions of competition (i.e., the two parties continuing to operate on the market independently of each other) is unlikely to prevail regardless of the merger and so the counterfactual should reflect the expected failure of one of the parties regardless of the merger. The same is not true of the former situation.

4.28 For these reasons, the Commission has taken into account competitive conditions and other developments post-notification of the Proposed Transaction insofar as they are unrelated to the Proposed Transaction and, in the Commission's view, would have happened in any event. Conversely, post-notification developments that are directly related or attributable to the Proposed Transaction have not been taken into account in the identification of the counterfactual.

[314] See Case M/21/021–*Bank of Ireland/Certain Assets of KBC* (23 May 2022).

[315] Case M.7278—General Electric/Alstom (Commission decision of 8 September 2015, Sect. 8.10.3.6).

Views of the Commission

4.29 With regard to specific points raised in the NaviCorp Confidential Submission (as set out in paragraph 4.17 above), the Commission notes the following:

4.30 [redacted]

4.31 [redacted]

[redacted]

4.32 [redacted]

4.33 [redacted]

4.34 [redacted]

4.35 [redacted]

4.36 [redacted],

321 [redacted]

322 [redacted].

[redacted]

4.37 [redacted]

4.38 [redacted] [redacted]

4.39 [redacted]

> [redacted]

323 [redacted].

[redacted]

4.40 [redacted]

[redacted]

4.41 [redacted]

324 [redacted]

325 [redacted]

326 [redacted]

[redacted]

4.42 [redacted]

Conclusion

4.43 In coming to its view of the appropriate counterfactual in this case, the Commission has fully considered the Parties' views. However, the Commission does not consider that there is sufficient evidence to change its preliminary view as set out in the Assessment and in all responses by the Parties up to the time of the Assessment. Accordingly, for the purposes of examining the competitive effects of the Proposed Transaction, the relevant counterfactual is that absent the Proposed Transaction, NaviCorp would remain in the market and would continue to be a significant and important competitor in the Relevant Markets identified in Section 3. The prevailing conditions of competition would be maintained and NaviCorp would remain an independent undertaking active in the Relevant Markets.

5. COMPETITIVE ASSESSMENT HORIZONTAL UNILATERAL EFFECTS

Introduction

5.1 In this section, the Commission sets out its analysis of the likelihood of horizontal unilateral effects occurring from the implementation of the Proposed Transaction in the Relevant Markets.

5.2 Unilateral effects, as explained in paragraph 4.8 of the Commission's Merger Guidelines, occur when *"a merger results in the merged entity having the ability and the incentive to raise prices at its own initiative and without coordinating with its competitors."*

5.3 In addition, the European Commission's *"Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings"* (the *"EC Horizontal Merger Guidelines"*) state the following in respect of *"Non-coordinated effects"*:

> *"A merger may significantly impede effective competition in a market by removing important competitive constraints on one or more sellers, who consequently have increased market power. The most direct effect of the merger will be the loss of competition between the merging firms. For example, if prior to the merger one of the merging firms had raised its price, it would have lost some sales to the other merging firm. The merger removes this particular constraint. Non-merging firms in the same market can also benefit from the reduction of competitive pressure that results from the merger, since the merging firms' price increase may switch some demand to the rival firms, which, in turn, may find it profitable to increase their prices. The reduction in these competitive constraints could lead to significant price increases in the relevant market.*
>
> *…*

> *A number of factors, which taken separately are not necessarily decisive, may influence whether significant non-coordinated effects are likely to result from a merger. Not all of these factors need to be present for such effects to be likely".*[327]

5.4 In considering the likelihood of the implementation of the Proposed Transaction resulting in unilateral effects, the Commission has considered evidence provided by the Parties and third parties. Unilateral effects occur when:

> *"a merger results in the merged entity having the ability and the incentive to raise prices at its own initiative and without coordinating with its competitors."*[328]

5.5 Following that assessment, the Commission has identified two potential theories of harm (i.e., how the Proposed Transaction is likely to result in a substantial lessening of competition (*"SLC"*) in the Relevant Market(s). These are:

- **Theory of Harm 1** - The loss of a close competitor in a highly concentrated market for the provision of buying group services will likely result in an increase in prices (or a reduction in discounts), a loss in service quality, and/or a loss of innovation to retail pharmacies in the State.

- **Theory of Harm 2** – The loss of a close competitor in a highly concentrated market for the provision of CMB services will likely result in an increase in prices, a reduction in service quality, and/or a loss of innovation to retail pharmacies in the State.

5.6 For the avoidance of doubt, the Commission considers that each of these theories of harm stands on its own merits. The Commission has reached a view in respect of each theory of harm. Its view in respect of one of the theories of harm, and the

[327] See paragraphs 24, 25, and 26 of the EC Horizontal Merger Guidelines. These factors include, but are not limited to: "*merging firms having large market shares";* merging firms being close competitors; the merged entity being able to hinder expansion by competitors; and the merger eliminating an important competitive force.

[328] Merger Guidelines, paragraph 4.8.

basis on which it has reached that view, is independent of and in no way reliant on its view, and the basis on which it has reached that view, in respect of the other theory of harm.

5.7 The Commission assesses each theory of harm in turn below.

Theory of Harm 1 - The loss of a close competitor in a highly concentrated market for the provision of buying group services will likely result in an increase in prices (or a reduction in discounts), a loss in service quality, and/or a loss of innovation the detriment of to retail pharmacies in the State.

5.8 The implementation of the Proposed Transaction would result in NaviCorp's buying group services, which trade under the Axium brand, transferring to Uniphar, resulting in an increase in concentration in the market for buying group services in the State when compared to the counterfactual. The theory of harm is that the merger would likely reduce the competitive pressure on providers of buying group services, due to the loss of a close competitor in the market. This, in turn, would likely lead to higher prices (or a reduction in discounts available to retail pharmacies), lower service quality, and/or reduced innovation to retail pharmacy customers in the State.

5.9 In considering the extent to which the Proposed Transaction is likely to raise unilateral effects concerns, the Commission sets out below:

a) Views of the Parties;

b) Impact of the Proposed Transaction on market structure and concentration;

c) Assessment of horizontal unilateral effects; and

d) Conclusion in respect of horizontal unilateral effects in the market for the provision of buying group services in the State.

Views of the Parties

5.10 The Parties submitted that the Proposed Transaction would not result in an SLC.

5.11 With regard to continuing competitive constraints within the market for the provision of buying group services, the Parties made five main arguments:

a) First, that pharmacies could be members of multiple buying groups, and therefore the aggregate market shares of all buying groups could, in theory, amount to over 100% of the number of pharmacies.[329]

b) Second, *"[t]he ability to be a member of one or more buying groups and the limited administration and lack of long-term commitment makes switching easy and commonplace."*[330]

c) Third, that there were different types of buying groups and a distinction should be drawn between *"compliance-based"* buying groups, such as Axium and LinkUp Gold, and *"à la carte"* buying groups such as LinkUp and Pharma Le Chéile.[331]

d) Fourth, that there were no significant barriers to entry or expansion and that setting up a buying group did not require significant capital investment, logistical operations or physical locations.[332]

e) Fifth, that two strong competitors can, under certain conditions (homogeneity, lack of capacity constraints, and low switching costs), be sufficient to produce competitive outcomes in a market, and that these conditions are present in the buying group market.[333]

[329] See, e.g., NaviCorp Phase 1 RFI Response, Q10.

[330] Merger Notification Form, section 5.3.

[331] Uniphar Phase 2 RFI Response, Q12. The different types of buying groups have been discussed in paragraphs 2.27-2.33 and 3.58-3.61.

[332] Merger Notification Form, section 5.3.

[333] Written Response, paragraphs 8.26-8.28.

5.12 With regard to continuing competitive constraints from outside the market, the Parties made four main arguments.

a) First, that there were constraints from self-supply and each retail pharmacy could choose not to be a member of a buying group and purchase directly from short-line wholesalers, parallel importers and manufacturer's representatives.[334] The Parties claimed specifically that:

- *"in the face of a potential price increase on branded POHPPs, these pharmacies could rely on Parallel Importers for* [redacted] *of their purchases";*[335]
- *"*[redacted] *of a typical pharmacy's generic volumes can be sourced directly from large generic POHPP suppliers";*[336]
- *"*[redacted] *of pharmacies who left Axium between 2019 and 2022 have joined a symbol group. Most notably over the time period considered, the number of pharmacies which left Axium to join a symbol group is* [redacted] *than the number of pharmacies which joined LinkUp Gold after leaving Axium* [redacted]*"*

b) Second, the buying group landscape was dynamic, with a blurring of lines between the buying groups offering additional services beyond negotiating discounts and the symbol brand offerings.[337]

c) Third, that there were indirect constraints on the buying groups due to competition downstream in the retail pharmacy market. In particular,

334 Supplementary Economics Report, p. 22.

335 Written Response, paragraph 3.19.

336 Written Response, paragraph 3.20.

337 Uniphar Response to Phase 2 RFI, Q3.

Uniphar would have to be mindful of the impact of their higher prices (or lower discounts) on downstream competition between its member pharmacies and other retail pharmacies, including *Boots* and *Tesco*.[338]

d) Fourth, that Axium, LinkUp and LinkUp Gold volumes were often distributed by Uniphar acting as a full-line wholesaler. Any reduction in volumes resulting from higher prices, or lower discounts provided by Axium, LinkUp or LinkUp Gold, would result in [redacted][339]

5.13 The Commission considers these views of the Parties and the detailed submissions from the Parties below in the assessment of horizontal unilateral effects in paragraphs 5.57 – 5.299. The Commission also considers evidence and views provided by third parties.

The impact of the Proposed Transaction on market structure and concentration

Market structure

5.14 Paragraph 3.1 of the Commission's Merger Guidelines states that *"[a] central element in assessing the competitive impact of a merger is identifying its effect on market structure."* Market structure can be characterised by the number, size and distribution of firms in a market. A merger or acquisition will have an impact on market structure as the merging parties which were two firms pre-acquisition become one firm post-acquisition. In the case of the Proposed Transaction, the impact on the market structure is the removal of a close and significant competitor in NaviCorp and the transfer of its market share to Uniphar.

5.15 The Commission considered three ways in which the structure of the market may be observed. These are:

[338] Supplementary Economics Report, p. 26.

[339] Supplementary Economics Report, p. 27.

- Total turnover of each buying group;
- The trade value of the total volumes of drugs purchased through each buying group;
- The number of members of each buying group.

Total turnover of each buying group

5.16 In this section, the Commission considers the estimated market shares of providers of buying group services in the State calculated on the basis of each of the three approaches to market structure listed above.

5.17 In relation to the total turnover of each buying group, the Commission considers that this may not be an appropriate measure of market shares, as the Parties have different operating models which may mean turnover comparisons could be misleading. In the case of NaviCorp, Axium is a standalone established entity, with its revenues accruing from [redacted]. Uniphar's model is different. LinkUp and LinkUp Gold exist within Uniphar's full-line wholesaler business. While the Commission does not consider this distinction to be material in terms of how each Party's buying group operates—both Parties charge membership fees and [redacted]—this distinction may mean that the turnover figures provided to the Commission by each Party may not be like-for-like comparisons.[340] Therefore, the Commission has focused on the other two measures set out in paragraph 5.15.

[340] The Supplementary Economics Report (footnote 32 on p 24) states: "*More generally, the author understands that* *Uniphar almost inevitably pass through* [redacted] *of manufacturer discount to their buying group members, partly because* [redacted]" (underline added). The Commission understands that Uniphar [redacted]. Therefore, while it may be true that LinkUp and LinkUp Gold [redacted] Therefore, the Commission considers it is accurate to say that [redacted]

The trade value of the total volumes of products purchased through each buying group

5.18 Table 3 below sets out the market shares based on the trade value of purchases made by each buying group's members of products that are subject to that buying group's negotiated discounts/supply terms, from 2018 to 2021.

Table 3: Market shares in the market for the provision of buying group services, trade value of purchases.

Owner	Uniphar		NaviCorp	United Drug		Indepharm
Buying group	LinkUp	LinkUp Gold	Axium	Pharma le Chéile	Pharmax	Indego Plus
2018	[0-10]%	[10-20]%	[50-60]%	[0-10]%	[10-20]%	-
2019	[0-10]%	[10-20]%	[50-60]%	[0-10]%	[10-20]%	-
2020	[0-10]%	[10-20]%	[50-60]%	[0-10]%	[10-20]%	[0-10]%
2021	[0-10]%	[10-20]%	[50-60]%	[0-10]%	[10-20]%	[0-10]%

Source: Commission analysis of evidence provided by the Parties and third parties.[341]

5.19 Using this measure, Axium is by far the largest player in the market, with a [50-60]% market share in 2021. United Drug totals [20-30]%, with Uniphar at [10-20]%. Each competitor's share has been relatively stable in this period, though Uniphar's market share has fallen from [20-30]% in 2018 to [10-20]% in 2021. Each of Axium and United Drug has marginally increased its market share in that period of time. The three largest competitors account for [90-100]% of the market, with Indepharm's market share at [0-10]% in the two years since it began supplying standalone buying group services.

The number of members of each buying group

5.20 Both of the Parties have noted that this is not an accurate measure for market shares. In its Response to the Phase 2 RFI, Uniphar noted:

[341] LinkUp and LinkUp Gold figures provided by Uniphar in its response to the Phase 2 RFI Response, Axium figures provided by NaviCorp in its response to the Phase 2 RFI Response, Pharma le Chéile and Pharmax figures provided by United Drug in its Response to CCPC Questionnaire. IndeGo Plus figures not available to the Commission with a [0-10]% estimate being used, which the Commission observes is higher than its share of membership numbers.

"there is considerable dual membership across the various buying groups. Therefore, the total number of pharmacies in each buying group is not mutually exclusive.

…

It should also be noted that some members of symbol groups and common ownership groups are simultaneously members of à la carte buying groups such as LinkUp and Pharma Le Chéile. For these reasons, it is not meaningful to estimate share percentages [using membership numbers]".[342]

5.21 In response to the Phase 2 RFI, NaviCorp noted:

"Navi does not consider that the number of members of a buying group provides an accurate proxy for market significance. In Navi's experience, the number of members does not correlate to the volume traded through a buying group, e.g. a buying group may have a high number of members, but a low volume of trade and therefore its high level of membership is not an accurate proxy for its market significance."[343]

5.22 The Commission understands that there is some 'multi-homing' in the market, where pharmacies are members of multiple buying groups. The Commission also notes NaviCorp's point that:

"[t]here is limited dual membership between LinkUp Gold, Axium and Pharmax. However, there are many instances where pharmacies are members of Axium and LinkUp, Axium and Pharma Le Chéile, Pharmax and LinkUp and LinkUp Gold and Pharma Le Chéile simultaneously."[344]

[342] Uniphar Response to Phase 2 RFI, Q5.

[343] NaviCorp response to Phase 2 RFI, Q5.

[344] Uniphar Response to Phase 2 RFI, Q10.

5.23 However, notwithstanding these arguments, the Commission believes that membership numbers are an important measure of market significance. The Commission notes that:

- A primary parameter of competition in this market between competitors is the recruitment and retention of member pharmacies; and,
- As set out paragraphs 5.49 – 5.55 below considering Uniphar's rationale for the Proposed Transaction, one of its motivations is to acquire Axium's members and to prevent [redacted]

5.24 Therefore, the Commission considers it relevant for the purposes of assessing the likely effects of the Proposed Transaction to also consider market shares in terms of membership numbers, but in addition uses a measure of market shares based on purchase volumes to ensure that its assessment of market shares is not materially distorted by any multiple memberships.

5.25 Table 4 below sets out the market shares based on membership numbers of each buying group in the State, from 2018 to 2021.

Table 4: Market shares in the market for the provision of buying group services, membership numbers.

Owner	Uniphar		NaviCorp	United Drug		Indepharm
Buying group	LinkUp	LinkUp Gold	Axium	Pharma le Chéile	Pharmax	Indego Plus
2018	[20-30]% [redacted]	[0-10]% [redacted]	[20-30]% [redacted]	[30-40]% [redacted]	[10-20]% [redacted]	-
2019	[20-30]% [redacted]	[0-10]% [redacted]	[20-30]% [redacted]	[30-40]% [redacted]	[10-20]% [redacted]	-
2020	[20-30]% [redacted]	[0-10]% [redacted]	[20-30]% [redacted]	[20-30]% [redacted]	[10-20]% [redacted]	<[0-10]% [redacted]
2021	[10-20]% [redacted]	[0-10]% [redacted]	[20-30]% [redacted]	[20-30]% [redacted]	[10-20]% [redacted]	<[0-10]% [redacted]

Source: Commission analysis of evidence provided by parties and third parties[345]

5.26 These market share figures show that United Drug's buying groups, Pharma le Chéile and Pharmax, together have [40-50]% of the total buying group members in the State, with Uniphar's buying groups, LinkUp and LinkUp Gold, totalling [20-30]%, NaviCorp having [20-30]% and IndeGo Plus, which has recently been established as a buying group separate to Indepharm's *Haven* symbol group, having less than [0-10]%. As noted above, the Commission understands that these figures will include instances of pharmacies which are members of more than one buying group being counted multiple times in the market shares of different buying groups.

5.27 While allowing for multiple buying group memberships, Table 4 shows that Uniphar's share of number of members declined between 2018 to 2021 from [30-40]% to [20-30]% —a loss of [0-10] percentage points of market share; while NaviCorp's share increased from [20-30]% to [20-30]%—a gain of [0-10] percentage points of market share. During that time, United Drug gained [0-10] percentage points of market share from [40-50]% to [40-50]%. This appears to indicate that the market share lost by Uniphar during this time period was significantly captured by NaviCorp.

The likely effect of the Proposed Transaction on the market structure

5.28 The Commission now sets out the likely effect of the Proposed Transaction on the structure of the market for buying group services in the State.

5.29 The Commission has taken, as a starting point, the shares of trade value of purchases and the shares of membership numbers, respectively, as of 2021 (see Tables 3 and 4 above).

[345] LinkUp, LinkUp Gold, Axium and IndeGo Plus figures provided by Uniphar in its Phase 2 RFI Response (NaviCorp's response provided an estimate for Axium for 2022, which is not comparable with other estimates). Pharma le Chéile and Pharmax figures provided by United Drug in its Response to Information Request.

5.30 Tables 5 and 6 set out the pre and post Proposed Transaction market shares, based on trade value and membership numbers of purchases, respectively.

Table 5: Market shares in the market for the provision of buying group services, trade value of purchases

Owner	Uniphar	NaviCorp	United Drug	Indepharm
Pre-Proposed Transaction	[10-30]%	[50-60]%	[20-30]%	[0-10]%
Post Proposed Transaction	**[70-80]%**		[20-30]%	[0-10]%

Source: Commission analysis of evidence provided by parties and third parties.[346]

Table 6: Market shares in the market for the provision of buying group services, membership numbers

Owner	Uniphar	NaviCorp	United Drug	Indepharm
Pre-Proposed Transaction	[20-30]%[redacted]	[20-30]% [redacted]	[40-50]%[redacted]	<[0-10]%[redacted]
Post Proposed Transaction	**[50-60]%**[redacted]		[40-50]%[redacted]	<[0-10]%[redacted]

Source: Commission analysis of evidence provided by parties and third parties.[347]

5.31 As can be seen in Table 5, following implementation of the Proposed Transaction, Uniphar ([70-80]%) would hold the largest share of trade value of purchases in the market, by a substantial margin over United Drug. While currently a significant percentage of shares in both measures are accounted for by Axium, which is independent from either full-line wholesaler, between them, the two full-line wholesalers would have close to the entire market following the Proposed Transaction, with Indepharm currently only having been able to accrue a very small share in the (approximately) two years since it began offering standalone buying group services. [redacted]

[346] As per Table 3.

[347] As per Table 2.

> *"in IndeGo Plus was set up a few years ago, when it was decided to offer a [sic] software.* [redacted] *CommCare explained* [redacted].[348]

5.32 In the Written Response, the Parties stated that *"[t]he Assessment's findings on market structure are based on an overly narrow view of the competitor set for buying groups and, as such, exclude important competitors such as direct to pharmacy sales, Parallel Importers and CMB services providers"*.[349] The Commission's assessment of market structure and concentration focuses, by definition, on the market(s) defined in Section 3. In Section 5, the Commission considers the constraints imposed on the market by out-of-market entities, in paragraphs 5.272 – 5.298.

5.33 The Commission now sets out its views on the effects of the Proposed Transaction on market concentration.

Market concentration

5.34 Market concentration refers to the degree to which production or supply in a particular market is concentrated in the hands of a few large firms. The Commission's Merger Guidelines state the following:

> *"Market concentration provides a snapshot of market structure and is often a useful indicator of the likely competitive impact of a merger. It is of particular relevance to the assessment of horizontal mergers. A horizontal merger that has little impact on the level of concentration in the market under consideration is unlikely to lead to an SLC.*

[348] CommCare Call Note, p. 1, saved as "2022.11.16 Call with Commcare - with Commcare's revisions.pdf".

[349] Written Response, paragraph 8.29.1.

Market concentration, however, is not determinative in itself. A high level of market concentration post-merger is not sufficient, in and of itself, to conclude that a merger is likely to lead to an SLC. Other relevant factors (such as, for example, the closeness of competition between the merging parties, market dynamics, barriers to entry and expansion, etc.) will be examined by the Commission before any conclusion is reached concerning the likely competitive impact of a merger.

Market shares are important when measuring concentration. The market shares of firms in the market can give an indication of the extent of a firm's market power. The combined market share of the merging parties, when compared with their respective market shares pre-merger, can provide an indication of the change in market power resulting from the merger. Competition concerns are more likely to arise when the merger creates a merged entity with a large market share."[350]

5.35 Paragraphs 3.9 to 3.10 of the Merger Guidelines set out that the Commission utilises the Herfindahl-Hirschman Index (*"HHI"*) as a measure of market concentration. The Commission's Merger Guidelines state that the Commission will have regard to the following HHI thresholds:

"A post-merger HHI below 1,000 is unlikely to cause concern.

Any market with a post-merger HHI greater than 1,000 may be regarded as concentrated and highly concentrated if greater than 2,000.

Except as noted below, in a concentrated market a delta of less than 250 is unlikely to cause concern and in a highly concentrated market a delta of less than 150 is unlikely to cause concern."

5.36 The Merger Guidelines explain, at paragraph 3.11 that:

[350] Merger Guidelines, paragraphs 3.2 to 3.4.

> *"[t]he purpose of the HHI thresholds is not to provide a rigid screen in order to determine whether or not a merger is likely to result in an SLC. Rather, the HHI is a screening device for deciding whether the Commission should intensify its analysis of the competitive impact of a merger."*

Views of the Parties

5.37 The Written Response and the Frontier Report states that two strong competitors are sufficient for competitive outcomes. The Written Response states that:

> *"economic theory shows that in markets characterised by high product homogeneity, lack of capacity constraints and lack of switching barriers, even two strong competitors are enough to reach competitive outcomes. In particular, under these conditions, there are no grounds to conclude that a market with three players will reach a different competitive equilibrium than a market where only two players are active.*
>
> *The evidence set out in the Frontier Economics Report shows that buying groups are a relatively homogenous product with no material capacity constraints and no significant switching costs for customers. These conditions suggest that the provision of buying groups services are currently competitive and would remain so post-merger".*[351]

5.38 The Frontier Report states:

> *"The conclusion that this market structure will inevitably give rise to an SLC is not correct from the perspective of economic theory, which shows that two strong competitors can be sufficient to produce competitive outcomes in a market. This is the case if the following three conditions hold:*

[351] Written Response, paragraphs 8.42-8.43.

a) Homogeneity: The two firms sell identical or very similar products. In these circumstances, given very limited product differentiation, price is the main parameter of competition. As such, any attempt by one firm to raise price above that of the other firm would lead to substantial switching.

b) Lack of capacity constraints: If so, competitors can readily expand to take on additional volumes.

c) Low switching costs: If so, customers can readily switch in the face of any price increase."[352]

Views of the Commission

5.39 Based on the market share estimates set out in Tables 5 and 6 above, there is high concentration in the market for the provision of buying group services in the State. Table 7 below illustrates that the HHIs in the market for the provision of buying group services following implementation of the Proposed Transaction would be 6,400 on the basis of the trade value of purchases made by pharmacies, and 4,976 on the basis of membership numbers. Furthermore, the changes in the HHI would be 2,151 and 1,323 respectively, which, as set out in paragraph 3.10 of the Commission's Merger Guidelines, means that an intensified analysis of the competitive impact of the Proposed Transaction is required.

Table 7: The HHI in the market for the provision of buying group services in the State, 2021.

	HHI (trade value of purchases)	HHI (membership numbers)
Pre-Proposed Transaction	4,249	3,653
Post-Proposed Transaction	6,400	4,976
HHI delta	2,151	1,323

Source: Commission analysis of evidence provided by the Parties and third parties.

[352] Frontier Report, paragraph 11.

5.40 As noted above, the Parties have argued that, given certain conditions, two strong competitors are enough to reach competitive outcomes. The Parties base this assertion on *"economic theory"* without specifying the precise theory to which they refer.[353]

5.41 The Commission does not agree with this view. The Parties have characterised similarities between the products offered by Uniphar and NaviCorp as evidence of homogeneity, such that neither Party could increase prices without incurring substantial switching. This view is not supported by the evidence. As discussed in more detail below, and as the Parties and third parties have consistently stated in submissions, Uniphar and NaviCorp compete vigorously in the market and are each other's closest competitor. Many similarities between Uniphar's and NaviCorp's products are a consequence of that competition, as Uniphar has attempted to follow NaviCorp's lead in order to compete more effectively.

Conclusions on market structure and market concentration

5.42 Market shares contribute to an understanding of the existing structure of the market for the provision of buying group services and the market dynamics in the State. The Commission's investigation revealed that, following the implementation of the Proposed Transaction, Uniphar would have the largest share using either a trade value of purchases measure or a membership numbers measure ([70-80]% and [50-60]%, respectively). Following implementation of the Proposed Transaction, the market structure would be one where the leading two undertakings (Uniphar and United Drug) will collectively have almost the entire market, with the only other remaining competitor having [0-10]% or less than [0-10]% market share, under the two respective market share measures.

5.43 The Commission has had regard to the EC Horizontal Merger Guidelines regarding the relationship between high market shares and market power which states that:

[353] Written Response, paragraph 8.26 & Oral Submissions Transcript, 18 October 2022, pp. 75-80.

"The larger the market share, the more likely a firm is to possess market power. And the larger the addition of market share, the more likely it is that a merger will lead to a significant increase in market power. The larger the increase in the sales base on which to enjoy higher margins after a price increase, the more likely it is that the merging firms will find such a price increase profitable despite the accompanying reduction in output. Although market shares and additions of market shares only provide first indications of market power and increases in market power, they are normally important factors in the assessment".[354]

5.44 The Commission's conclusion is that these market shares indicate a significant increase in market power brought about by the Proposed Transaction when compared with the counterfactual.[355] The Commission is also of the view that these large increases in market shares could make price increases (or reduction in discounts) profitable despite a potential loss of some customers.

5.45 On the basis of the HHI calculations set out in Table 7 above, and consistent with the Commission's Merger Guidelines, the market for the provision of buying group services is already highly concentrated. High concentration can be observed irrespective of whether one views the market in terms of trade value of total drugs purchased by the buying group or by membership numbers. The Commission notes that implementation of the Proposed Transaction is likely to result in the market for buying group services in the State becoming more concentrated when compared with the counterfactual. In line with the Merger Guidelines,[356] the high level of concentration indicates that the Commission should intensify its analysis of the competitive effects of the Proposed Transaction in the market for buying group services in the State.

[354] EC Horizontal Merger Guidelines, paragraph 27.

[355] See Merger Guidelines, paragraphs 3.2 to 3.4, for an explanation of why market shares can be a measure of market power.

[356] Merger Guidelines, paragraphs 3.9-3.12.

Consideration of the rationale for the Proposed Transaction

5.46 The Commission has also reviewed Uniphar's internal documents to get an insight into the Proposed Transaction and Uniphar's rationale for pursuing it.

5.47 As set out in paragraph 1.22, the Parties stated that the rationale for the Proposed Transaction included for Uniphar to:

- *"enhance its retail support offering";*
- *to "provide Uniphar with an enhanced market leading presence in community pharmacy and a platform to continue investing in its supply chain infrastructure, its brands, support services and its retail digital strategy"; and that*
- *"[redacted]".*[357]

5.48 In an internal Uniphar presentation on 17th November 2020,[358] Uniphar set out the following reasons for buying NaviCorp:

"[redacted]

[357] Uniphar Response to Phase 1 RFI, Q28. See footnote 11 in relation to Phoenix's acquisition of United Drug.

[358] Uniphar document "*Navi_17 Nov.pptx.PPTX*", dated 17 November 2020, p. 8, Uniphar Response to Phase 1 RFI.

[redacted]”

5.49 In an internal Uniphar presentation on 26th January 2021, on the subject of potential merger and acquisition activity, Uniphar's strategic rationale for the Proposed Transaction was set out as:

‘[redacted]”.[359]

5.50 While some of the rationale in Uniphar's internal presentations above aligns with what Uniphar stated the rationale of the Proposed Transaction to be in the Phase 1 RFI Response, these internal documents also suggest a potential anti-

[359] Uniphar document, “*MA and IR_Jan 2021 Board_v2.pdf.PDF*”, dated 26 January 2021, p. 16, Uniphar Response to Phase 1 RFI.

competitive rationale for the Proposed Transaction. In both presentations,[360] the goal of [redacted] a new or existing competitor acquiring scale in the market is clearly set out as a reason for the Proposed Transaction.

5.51 The presentations also highlight Uniphar's concerns around Axium's business [redacted] to another wholesaler, i.e., United Drug. In this sense, on the basis of the presentation cited in paragraph 5.49, the Commission understands one of the desired effects of the Proposed Transaction is the elimination of the competition at a wholesale level between Uniphar and United Drug for Axium's customer base.

5.52 The Commission notes that Uniphar explains:

> *"Axium members are not required to have Uniphar as their full line wholesaler. Indeed, approximately* [redacted]*% of Axium members have United Drug as their full line wholesaler so they order their non-Axium purchases through United Drug."*[361]

5.53 The Commission understands from this that, at present, a [redacted] proportion of Axium members use United Drug rather than Uniphar as their primary full-line wholesaler. However, members of Uniphar's LinkUp Gold buying group are required to use Uniphar as their full-line wholesaler. It is possible, particularly noting the ambition to '[redacted]" that a similar requirement may apply to Axium members following implementation of the Proposed Transaction. The effect of this would be to significantly reduce the competitive constraint currently imposed upon Uniphar's full-line wholesale business by Axium.

5.54 In the Written Response, the Parties stated that:

[360] Uniphar document "*Navi_17 Nov.pptx.PPTX*", dated 17 November 2020, p. 8, Uniphar Response to Phase 1 RFI, and Uniphar document, "*MA and IR_Jan 2021 Board_v2.pdf.PDF*", dated 26 January 2021, p. 16, Uniphar Response to Phase 1 RFI.

[361] Uniphar Response to Phase 2 RFI, Q6.

"Uniphar does not make any anti-competitive statements, for example, as to raising prices downstream. Instead, these statements demonstrate Uniphar's concern to maintain its current competitive position against [redacted] *Further, they demonstrate Uniphar's concern over* [redacted] *Given that Uniphar's breakeven volume level is* [redacted]*%, this is an entirely legitimate concern."*[362]

"[T]he Commission's statement that it is possible that Uniphar may require Axium members to use it as their full-line wholesaler is conjecture and has no basis in evidence. Secondly, even if Uniphar were to do this, this would not <u>eliminate</u> the competitive constraint currently imposed upon Uniphar's full-line wholesale business as Axium members are not obliged to make purchases through Axium or to maintain their memberships. It is only if Uniphar acquired those retail pharmacies that the competitive constraint they pose would be <u>eliminated</u>. The Commission overstates this issue and cannot rely on this as evidence of an SLC." [363]

5.55 The Commission notes Uniphar's view in respect of losing the wholesale volume from NaviCorp customers. This view presupposes that competition for current NaviCorp customers is expected to be limited, which further confirms the Commission's analysis of market shares as a good proxy for market power. However, from the Commission's perspective, this is not a legitimate competition concern. Increased competition for the Axium wholesale volume from, e.g., the Phoenix group, for NaviCorp and its customers is *prima facie* good for the market and good for consumers. The role of the Commission is to ensure that the Proposed Transaction does not result in an SLC in the Relevant Markets.

[362] Written Response, paragraph 8.31.

[363] Written Response, paragraph 8.34.

5.56 In relation to the second point set out in paragraph 5.54 above, the Commission notes that the Parties have not provided robust evidence to back up this position. For example, in addition to the points noted in paragraph 5.53, the Parties did not address the Commission's concern about the way in which the Proposed Transaction could block opportunities for a competitor to acquire scale in the Irish market. Indeed, if the Proposed Transaction is not envisaged to have any impact on those customers' use of wholesalers, it is not clear how it would achieve the stated rationale of the Proposed Transaction to mitigate against Uniphar losing wholesale volume.

Assessment of Horizontal Unilateral Effects in the market for the provision of buying group services

5.57 The findings above indicate that, even prior to the Proposed Transaction, the market for the provision of buying group services in the State is already highly concentrated. Following implementation of the Proposed Transaction, the market will become substantially more concentrated. Indeed, the level of HHI is more than 3 times the level at which the market is deemed to be highly concentrated based on trade value of purchases, as per the Commission's Merger Guidelines.[364] It is around 2.5 times the threshold using the measure of membership numbers.

5.58 Furthermore, the increase in HHI, in terms of trade value or purchases, is more than 10 times the threshold beyond which the Commission cannot conclude that the Proposed Transaction is unlikely to cause concern, as per the Commission's Merger Guidelines (see paragraph 5.35 above). It is more than 6 times the threshold using the measure of membership numbers.

5.59 Higher levels of concentration are generally associated with less competition. The Commission is concerned that this reduction in competition could potentially lead to a combination of higher prices, lower discounts, reduced service quality or lower innovation, to the detriment of retail pharmacies who are current or

[364] See paragraph 5.35 above.

potential customers of buying groups. In the analysis below, the Commission considers whether the presumption of higher levels of concentration implying less intense competition is valid in this case.

5.60 The potential responses of other providers in the markets, and any constraints outside the markets, are also relevant in evaluating Uniphar's pricing incentives following implementation of the Proposed Transaction. The Commission's Merger Guidelines note the following relevant factors which are relevant to determine whether an SLC is unlikely to occur despite the high levels of concentration in the market and the increase in concentration that likely will occur following the implementation of the Proposed Transaction:

> *"Competitive constraints on a merged entity will be weaker to the extent that (i) there is an absence of substantial competition from other firms in the market or firms likely to enter in a timely manner, (ii) competitors have insufficient productive capacity to increase output, or (iii) competitors do not have a strong incentive to compete (for example, if they might also benefit from increased prices), also referred to as price accommodation."*[365]

> *"In addition, competitive constraints will be weakened to the extent that customers are not willing and/or able to switch from one competitor to another."*[366]

5.61 In assessing whether the loss of Axium as a close competitor in the market for buying groups services resulting from the Proposed Transaction is likely to result in an SLC, the Commission has therefore also considered the following:

a) **Closeness of competition.** The EC Horizontal Merger Guidelines note that *"[t]he higher the degree of substitutability between the merging firms'*

[365] Merger Guidelines, paragraph 4.11.

[366] Merger Guidelines, paragraph 4.12

products, the more likely it is that the merging firms will raise prices significantly", while also noting that *"[t]he merging firms' incentive to raise prices is more likely to be constrained when rival firms produce close substitutes to the products of the merging firms than when they offer less close substitutes."*[367]

b) **The competitive constraint imposed on the market by Axium.** The EC Horizontal Merger Guidelines state that *"[s]ome firms have more of an influence on the competitive process than their market shares or similar measures would suggest. A merger involving such a firm may change the competitive dynamics in a significant, anticompetitive way, in particular when the market is already concentrated"*.[368]

c) **Barriers to entry and expansion.** The Commission's Merger Guidelines note that *"[m]arket power may be constrained by the occurrence or threat of new entry. A merger is unlikely to lead to an SLC if entry into the market is sufficiently easy such that market participants, post-merger, could not maintain a price increase above pre-merger levels."*[369] They furthermore note that *"[h]arm to competition threatened by a merger may also be constrained by the ability of rivals profitably to expand production in response to higher prices."*[370]

d) **Potential constraints from self-supply.** The ability of customers to self-supply—to not purchase from any of the remaining suppliers in the market—may, if sufficiently substantial, reduce or remove the likelihood of an SLC. Ability to self-supply is one type of 'countervailing buyer power' which the Commission's Merger Guidelines notes *"Where customers have countervailing buyer power post-merger, even after any reduction in buyer*

[367] EC Horizontal Merger Guidelines, paragraph 28.

[368] EC Horizontal Merger Guidelines, paragraph 37.

[369] Merger Guidelines, paragraph 6.1.

[370] Merger Guidelines, paragraph 6.19.

power caused by the merger, this may be sufficient to prevent competitive harm."

e) **Other constraints.** The Commission considers whether other factors outside the market have the potential to counteract a potential SLC in this market. Factors which will be considered include: potential constraints from CMB providers; potential constraints as a result of downstream competition; and potential constraints as a result of competition at the wholesale level.

5.62 Each of the above factors are assessed in turn below. The Commission sets out the views of the Parties, the views of third parties, the evidence provided to the Commission and its analysis of the above.

Closeness of competition

5.63 The Commission has examined a number of factors in order to determine the extent of closeness of competition between Uniphar and NaviCorp in the market for the provision of buying group services in the State.

5.64 Paragraph 1.4 of the Commission's Merger Guidelines sets out that:

> *"Rivalry between businesses, together with the credible prospect of consumers switching from one business to another, provides an incentive for businesses to compete with each other to the benefit of consumers."*

5.65 The Commission has taken note of the EC's Horizontal Merger Guidelines as follows:

> *"Products may be differentiated within a relevant market such that some products are closer substitutes than others. The higher the degree of substitutability between the merging firms' products, the more likely it is that the merging firms will raise prices significantly. For example, a merger between two producers offering products which a substantial number of*

customers regard as their first and second choices could generate a significant price increase. Thus, the fact that rivalry between the parties has been an important source of competition on the market may be a central factor in the analysis. High pre-merger margins may also make significant price increases more likely. The merging firms' incentive to raise prices is more likely to be constrained when rival firms produce close substitutes to the products of the merging firms than when they offer less close substitutes. It is therefore less likely that a merger will significantly impede effective competition, in particular through the creation or strengthening of a dominant position, when there is a high degree of substitutability between the products of the merging firms and those supplied by rival producers."[371]

5.66 In examining closeness of competition, the Commission first assesses switching by pharmacies between providers of buying group services. The Commission then considers other factors that may indicate the level of rivalry which exists between Uniphar and NaviCorp, as well as third party competitors, and evidence of the degree of substitutability between their products and services.[372]

<u>Views of the Parties</u>

5.67 In their response to the Phase 2 RFI, NaviCorp supplied data on where retail pharmacies who had left the Axium buying group to join another buying group had gone. From 2019 to 2022:

- [redacted] had left Axium to join [redacted]
- [redacted] had left Axium to join [redacted]; and

[371] EC Horizontal Merger Guidelines, paragraph 28.

[372] EC Horizontal Merger Guidelines, paragraph 28.

- [redacted] had left Axium to join [redacted].[373]

5.68 In response to the Phase 2 RFI, Uniphar supplied data on where retail pharmacies who had left the LinkUp and LinkUp Gold buying group to join another buying group had moved to.

- [redacted] pharmacies left the LinkUp Gold buying group between 2019 and 2022. Of these, [redacted] pharmacies joined Axium and [redacted] joined Pharmax.[374]
- [redacted] pharmacies left the LinkUp buying group between 2015 and 2021. Of these, [redacted] joined Axium, [redacted] joined Pharmax, [redacted] joined Pharma Le Chéile and [redacted] joined LinkUp Gold.[375]

5.69 The Frontier Report provided further information on switching. According to the Parties' analysis, of the total number of members who left Axium in the period 2019-2022, [redacted]% switched to a different buying group.[376] Of the total number of members who left Uniphar's LinkUp Gold in the same period, [redacted]% switched to a different buying group.[377]

5.70 Reflecting on this data, the Frontier Report stated that:

[373] NaviCorp Response to Phase 2 RFI, Q10. Other pharmacies left Axium for reasons other than switching to a different buying group. For example, [redacted] pharmacies joined symbol groups, [redacted] closed, [redacted] pharmacies were sold.

[374] Uniphar document, [redacted] Uniphar Response to Phase 2 RFI. Other pharmacies left LinkUp Gold for reasons other than switching buying groups. For example, [redacted] were sold [redacted] left without joining another buying group, [redacted] joined [redacted] and [redacted] joined [redacted]

[375] Uniphar document, [redacted] Uniphar Response to Phase 2 RFI.Other pharmacies left LinkUp for reasons other than switching buying groups. For example, some were sold and the new owner did not remain with LinkUp while [redacted] pharmacies joined symbol groups. Of these [redacted] pharmacies, [redacted] joined a Uniphar symbol group.

[376] [redacted]% joined a symbol group, and [redacted]% closed or became independent. Frontier Report, paragraph 46.

[377] [redacted]% joined a symbol group and [redacted] pharmacies became independent. Frontier Report, paragraphs 46 and 47.

"This data shows that it would be inappropriate to omit alternative business models from the discussion, as these do and will pose a relevant and important source of competitive constraint on the merged entity."[378]

5.71 The Frontier Report commented on the prevalence of switching:

"Uniphar switching data shows that in 2019 [redacted]% of LinkUp Gold members left the group. This percentage decreased to [redacted]% in 2020 and [redacted]% in 2021. We note that the apparent decline in switching activity should be considered in the more general context of disruption caused [sic] the Covid-19 pandemic, and so we would place lower weight on the results for these years."[379]

5.72 Uniphar's view is that there are minimal costs for pharmacies which switch buying groups:

"The ability to be a member of one or more buying groups and the limited administration makes switching easy and commonplace. Uniphar does not have any specific information on the switching costs incurred by individual pharmacies in switching retail pharmacy buying groups.

However, outside of minimal management time and very basic IT set-up, there are no switching costs involved in switching retail pharmacy buying groups.

In relation to membership fees, an independent pharmacy can cancel their membership fee on a monthly basis and therefore there are no membership fees foregone.

In relation to IT changes/additions, there are no switching costs involved. On termination of membership by a member, the relevant IT systems will

[378] Frontier Report, paragraph 47.

[379] Frontier Report, paragraph 29

be disabled remotely. Any IT applications relevant to any new buying group which the member subsequently joins can also be set up remotely with the member provided with login details relevant to the application. The only cost involved in switching buying groups is in staff training and IT configuration set-up time which again is minimal and can be done in less than one hour."[380]

5.73 NaviCorp's view in relation to pharmacies switching between buying groups is as follows:

> *"There are, to Navi's knowledge, no penalties and no barriers to leaving buying groups (for example, this is the case for Axium members);*
>
> *- As mentioned in the Merger Notification Form, the ability to be a member of more than one group and the limited administration and lack of long-term commitment makes switching easy and commonplace.* [redacted] *in membership is common. For example, while Axium's overall numbers grew from* [redacted] *in 2017 to* [redacted] *in 2020 - an average of* [redacted] *stores per annum left the buying group during that period".*[381]

5.74 In response to the Phase 1 RFI, NaviCorp also stated that there were no switching costs for pharmacies changing buying groups and provided more detail on the following aspects of switching:

> *"Management time: the impact of switching on management would not be particularly onerous. Management are not required to give notice to the incumbent buying group (of joining a new buying group) and would simply have to open an account with the new buying group. As explained in response to Question 4, new account documentation, for Axium at least,*

[380] Uniphar Response to Phase 2 RFI, Q11.

[381] NaviCorp Response to Phase 1 RFI, Q10.

is minimal. Management would also have to contact certain suppliers to update their account, for example, PCO Manufacturing Ltd.

Additional fees: the only change to fees would be in respect of membership fees and this would depend on which buying group a pharmacy is switching to. As outlined, membership fees vary from €[redacted] *per month. On that basis, a pharmacy could face an increase of up to €*[redacted] *per month in its buying group membership fee if it switched away from Axium. Many pharmacies on joining a new buying group* [redacted] *To the best of Navi's knowledge none of the buying groups charge a set up or joining fee.*

Volume based discounts: Navi is unaware of any buying group that operate volume-based discounts or rebates and therefore is not aware of any such discounts that would be foregone if a pharmacy switched buying group.

Staff training: if switching buying group, a pharmacy will also have to switch buying platform. The buying platforms are all cloud based platforms. The set up is straightforward and should take no more than 10-15 minutes. While staff will have to be trained on new systems, this is not particularly intensive or time consuming. Full set up and training of all the dispensary staff in a pharmacy would normally only take a full morning and then a few additional follow up support calls. As all the buying platforms are cloud based there is no additional IT hardware or software purchases required to join another buying group."[382]

[382] NaviCorp Response to Phase 2 RFI, Q11.

5.75 Considering closeness of competition within the market for the provision of buying group services:

> *"…Navi considers* [redacted] *to be the closest buying group to Axium."*[383]

5.76 Uniphar is of the view that:

> *"Uniphar considers that LinkUp Gold competes closely with* [redacted] *and* [redacted] *for members in the State. There is limited dual membership between* [redacted] *and* [redacted]*. However, there are many instances where pharmacies are members of* [redacted] *and* [redacted] [redacted] *and* [redacted] [redacted] *and* [redacted] *and* [redacted] *and* [redacted] [redacted] *simultaneously."*[384]

5.77 In response to Commission questions regarding the closeness of competition between the different buying groups, Uniphar said that:

- *"[Uniphar] does not formally monitor* [redacted]*".*[385] It does, however, monitor *"*[redacted]*"*[386]

- *"*[redacted]

[383] NaviCorp Response to Phase 2 RFI, Q6.

[384] Uniphar Response to Phase 2 RFI, Q10.

[385] Uniphar Response to Phase 2 RFI, Q1.

[386] Uniphar Response to Phase 2 RFI, Q9(a).

[redacted]"[387]

- Uniphar considers that "[redacted]" is the most important area of competition to retail pharmacies.[388] It considers that *"LinkUp Gold competes closely with* [redacted] *and* [redacted] *in terms of the* [redacted] *and* [redacted] *it offers".*[389] Uniphar said that *"LinkUp competes closely with* [redacted] *in terms of the* [redacted] *and* [redacted]*".*[390]

- *"Whilst the respective buying groups have slightly different offerings in terms of quality of service, LinkUp Gold,* [redacted] *and* [redacted] *would be considered to* [redacted] *with the exception that* [redacted] *and* [redacted] *technology offering would be superior to that of* [redacted] *LinkUp and* [redacted] *would be considered to be* [redacted] *with each other in terms of quality of service."*[391]

- *"LinkUp would compete closely with* [redacted] *in terms of* [redacted]*."* Uniphar said that LinkUp Gold, [redacted] and [redacted] all compete closely.[392]

[387] Uniphar Response to Phase 2 RFI, Q1(viii).

[56] Uniphar Response to Phase 2 RFI, Q6.

[56] Uniphar Response to Phase 2 RFI, Q6.

[56] Uniphar Response to Phase 2 RFI, Q6.

[391] Uniphar Response to Phase 2 RFI, Q6.

[392] Uniphar Response to Phase 2 RFI, Q6.

- *"The main challenges which LinkUp Gold has faced and continues to face in seeking to grow its customer base organically is* [redacted] *"* [393]

5.78 The Commission reviewed a number of internal documents from Uniphar which included the following:

- A 2021 Uniphar document mentions losing customers to Axium and gaining customers from Axium and that in an attempt to increase its members numbers Uniphar [redacted][394]

- A 2021 Uniphar document mentions [redacted] [395]

- A 2021 Uniphar document listing target pharmacies for Link Up and Link Up Gold describes many as [redacted] [396]

Views of Third Parties

5.79 The Commission sought the views of third parties on the closeness of competition between buying groups. United Drug, which owns the Pharma Le Chéile and Pharmax buying groups, noted:

[393] Uniphar Response to Phase 2 RFI, Q25(v).

[394] Uniphar document, [redacted] Uniphar Response to Phase 1 and Phase 2 RFI. See also Uniphar document, [redacted] Uniphar Response to Phase 1 and Phase 2 RFI.

[395] Uniphar document, [redacted], Uniphar Response to Phase 1 and Phase 2 RFI.

[396] Uniphar document [redacted] Uniphar Response to Phase 1 and Phase 2 RFI.

"Retail pharmacies can switch retail pharmacy buying group and once they engage in the correct processes to notify and commence termination activities, the switch can be made in a highly organised and timely manner. This activity is reasonable [sic] common amongst retail pharmacy today".[397]

5.80 Outlining some of the specific switching costs pharmacies face, United Drug stated that:

"It is generally reasonably easy to switch buying groups as a non-branded retail pharmacy owner. The main barrier for switching would appear to relate to pharmacy owners that have invested heavily in their branding / franchise model that may also include complex technology systems such as EPOS for retail/front of shop ranges and dispensary systems for Rx".[398]

5.81 United Drug also noted that it would *"expect that pharmacies will continue to switch from one offering to another"*.[399]

5.82 In a call with the Commission, Accord, a manufacturer of POHPPs, noted that it had been tracking the movement of independent pharmacies in and out of the various buying groups for a number of years. Accord noted the movement of independent pharmacies between the various groups had *"settled down in recent times but that you can assume that every pharmacy has been a target for every buying group throughout the years."*[400]

[397] United Drug Response to Information Request, Q16, saved as "2022.08.22 CCPC 01.07.22- 22.08.22 Non-confidential_Redacted".

[400] United Drug Response to Information Request, Q16, saved as "2022.08.22 CCPC 01.07.22- 22.08.22 Non-confidential_Redacted".

[399] United Drug Response to Information Request, Q6, saved as "saved as "2022.08.22 CCPC 01.07.22- 22.08.22 Non-confidential_Redacted".

[400] Accord Call Note, dated 29 June 2022, p.2, saved as "CCPC Call Note - CCPC and Accord Healthcare – Redacted".

5.83 In United Drug's view, Pharma Le Chéile is the closest competitor to both Uniphar's LinkUp and LinkUp Gold, and Axium is the second closest competitor to LinkUp and LinkUp Gold. United Drug believes that Pharmax is the closest competitor to Axium,[401] and *"Haven-Indego"* is next closest.[402]

5.84 In relation to the closeness of competition between providers of buying group services, Manufacturer X's view is that:

> *"buying groups [are] two-tiered. LinkUp, and Pharma Le Chéile would be the lower tier that smaller independents use to buy* [Pharmacy X's]'s *products at better terms than is offered by the wholesaler alone, whereas the higher tier would have Pharmax, LinkUp Gold and Axium."*[403]

Views of the Commission

5.85 In its analysis of switching, the Commission has taken note of the EC Horizontal Merger Guidelines, which state that:

> *"Customers of the merging parties may have difficulties switching to other suppliers because there are few alternative suppliers or because they face substantial switching costs. Such customers are particularly vulnerable to price increases. The merger may affect these customers' ability to protect themselves against price increases."*[404]

5.86 The pattern of switching in the market for the provision of buying group services indicates that the majority of retail pharmacies that switched from Uniphar's LinkUp Gold switched to Axium. While the majority of pharmacies that switched

[401] Note that United Drug did not include LinkUp Gold as a competitor of Axium in its analysis.

[402] United Drug Response to Information Request, Q14, saved as "2022.08.22 CCPC 01.07.22- 22.08.22 Non-confidential_Redacted".

[403] Manufacturer X Call Note, dated 29 June 2022, saved as "2022.06.30 Call with Manufacturer x - Non-Confidential_Redacted.pdf".

[404] EC Horizontal Merger Guidelines, paragraph 31.

from Axium switched to [redacted] [redacted] was the second most frequent choice for Axium customers seeking to switch.

5.87 There is evidence of switching from a buying group offering a more restricted range of services (LinkUp, Pharma Le Chéile) to a buying group offering a wider range of services (LinkUp Gold, Axium, Pharmax), but limited switching in the other direction. For example, around half of pharmacies leaving LinkUp moved to a buying group offering a wider range of services.

5.88 Evidence provided to the Commission of switching between Axium, LinkUp Gold and Pharmax suggests that switching full-line wholesalers is not an important factor which would overly influence the decision of a pharmacist. For example, Uniphar stated that approximately [redacted]% of Axium members have United Drug as their full line wholesaler, and therefore order their non-Axium purchases through United Drug.[405] Furthermore, of those pharmacies that left Axium between 2019 and 2022, [redacted]

5.89 The Commission's view is that the evidence indicates that the financial costs associated with switching between buying groups are low. The costs associated for retail pharmacies switching between buying groups associated with different full-line wholesalers are also low. There is some cost associated with changing IT platforms and staff training, but this does not seem to be prohibitive.

5.90 The Commission notes that some buying group options are not available to all independent pharmacies. For example, a pharmacy does not have freedom of choice to join LinkUp Gold, which has membership criteria.[406] Uniphar has stated:

[405] Uniphar Response to Phase 2 RFI, Q6.

[406] The Commission understands that no other buying group has an equivalent volume-based membership criteria.

“[redacted].”[407] [408]

5.91 On the basis of the evidence available, the Commission's understanding is that the choices available for a pharmacy seeking to switch buying group may also depend on the volume of purchases that the pharmacy is likely to make.[409] [redacted] It is therefore not necessarily the case that a member of another buying group could easily switch to LinkUp Gold.

5.92 In order to fully consider closeness of competition, the Commission examined a number of factors in addition to switching, including the monitoring of competitors; pricing; and technology.

5.93 The way in which a company **monitors its competitors** can often give an insight into the company's perception of the significance of competitive threat from those competitors.

5.94 The Commission has seen no evidence from the Parties that either Uniphar or NaviCorp focuses on monitoring any particular individual competitor. Although NaviCorp considers [redacted] to be its closest competitor, there is no evidence to suggest that it monitors [redacted] more closely than any other competitor.

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[407] Uniphar document, "*32131715_2(220503 Uniphar plc Submission to the CCPC CONFIDENTIAL).DOCX*", dated 3 May 2022.

[408] This casts some doubt on the claim in footnote 33 of the Supplementary Economics Report: "*The author understands that while members of Axium would not also be members of* [redacted] *or* [redacted] *it would be common for them to be members of either* [redacted] *or* [redacted] *As such, they would be able to easily switch to* [redacted] *or* [redacted]*.*"

[409] It is the Commission's understanding that [redacted]

5.95 In examining **pricing**, while the monthly membership fees charged by LinkUp Gold, Axium and Pharmax are broadly comparable, manufacturer-funded discounts represent one of the main parameters on which buying groups compete.

5.96 The Frontier Report stated that:

> *“a buying group’s ability to secure discounts with manufacturers and pass through those discounts to their members represents* [redacted] *and on this basis* [redacted]*”*[410]

5.97 Uniphar has stated that it believes that:

> [redacted][411]

5.98 NaviCorp has noted that:

> ‘[redacted][412]

5.99 The Commission agrees that Uniphar and NaviCorp compete on price in the form of the level of manufacturer-funded discounts secured and passed through to retail pharmacies, but does not agree with the assertion made in the Frontier Report that this suggests that buying groups are homogenous. The Commission

[410] Frontier Report, paragraph 20.

[411] Uniphar Response to Phase 2 RFI, Q6.

[412] NaviCorp Response to Phase 2 RFI, paragraph 6.28.

notes that the Parties’ descriptions of pricing emphasise the importance of scale and compliance in being able to secure discounts. The Commission has seen sufficient evidence of differences[413] in the manufacturer-funded discounts achieved by different buying groups and in the proportion passed through to retail pharmacies to indicate that, as United Drug has pointed out, manufacturer-funded discounts:

> “[redacted]”[414]

5.100 The Commission notes that the Parties highlight the similarities in **technology** offered by buying groups. According to Uniphar:

> *“Uniphar considers that each of the ordering platforms compete closely with little differentiation between offerings.”*[415]

5.101 However, this is contradicted by both Uniphar’s comment in its Phase 2 RFI Response that *‘[redacted] and [redacted] technology offering would be superior to that of [redacted]’*[416] and the fact that, based on an internal Uniphar document from 17 November 2020, Uniphar considered [redacted][417]

5.102 *NaviCorp has stated that:*

> [redacted]

[413] Note that Uniphar and United Drug treat the accounting of discounts differently to Axium because they are vertically integrated.

[414] United Drug Response to Information Request, Q13. “2022.08.22 CCPC 01.07.22- 22.08.22 Non-confidential_Redacted”.

[415] Uniphar Response to Phase 2 RFI, Q6 p. 26.

[416] Uniphar Response to Phase 2 RFI, Q6, p. 27.

[417] Uniphar document “*Navi_17 Nov.pptx.PPTX*”, dated 17 November 2020, p. 9 Uniphar Response to Phase 1 RFI.

[redacted] [418]

5.103 Certain third parties commented that buying groups compete on the basis of their technology. Menarini noted on a call with the Commission that:

> *"Pharmax have begun to try compete with Axium in terms of technology but whether there is scope for another decent sized buying group is another question".*[419]

5.104 Viatris, a pharmaceutical manufacturer, on a call with the Commission, also detailed how it viewed Axium's technology relative to other buying groups in the market:

> *"*[The CCPC] *asked if any of the buying groups are a market leader because [Viatris] noted earlier that Axium was a pioneer.* [Viatris] *explained that Axium are no longer a pioneer, they had the first sophisticated system but all of the major buying groups now have one in place.* [The CCPC] *asked what* [Viatris] *meant by a sophisticated system.* [Viatris] *explained that it is the IT system that allows procurement to take place."*[420]

5.105 The Commission considers that Uniphar has made efforts to follow NaviCorp's technological lead, and this is a strong indicator of closeness of competition. While there is less difference now between the technologies offered by buying groups

[418] NaviCorp Response to Phase 2 RFI, Q6, paragraph 6.33.

[419] Menarini Call Note, dated 30 June 2022, p. 5, saved as "2022.06.30 Call with Menarini_Redacted.docx".

[420] Viatris Call Note, dated 6 July 2022, p. 3, saved as "2022.07.27 CCPC Call with Viatris_Redacted.docx".

than would have been evident five years ago, technological differentiation does remain.[421]

Conclusion on closeness of competition

5.106 The Commission has considered a range of factors in paragraphs 5.85 – 5.105 above in coming to its view on closeness of competition. The Commission notes that the criterion of closeness of competition is only one factor which must be taken into account together with other relevant factors in order to enable the Commission to determine whether the concentration in the market for the provision of buying group services is likely to result in harmful unilateral effects and, therefore, to give rise to an SLC.

5.107 In weighing up all these factors and evidence, the Commission's conclusion is that Uniphar and NaviCorp compete closely with each other in the market for the provision of buying group services in the State. The Commission has come to this conclusion based on the following:

a) There is evidence of switching between buying groups, in particular between Pharmax, Axium and LinkUp Gold. The majority of members who leave one of these three buying groups join one of the others;

b) Axium is the first choice for pharmacies leaving LinkUp Gold, and [redacted]

c) Following the completion of the Proposed Transaction, customers of the Parties would have few alternative suppliers to switch to. The removal of Axium would remove one of the three biggest buying groups from the market;

[421] Axium's role as an important provider and innovator is discussed in more detail below.

d) Competition between the Parties is particularly close in pricing (specifically in the level of manufacturer-funded discounts secured and the pass through to pharmacies) and in technology; and

e) The Parties and third parties have identified a high degree of closeness of competition between the LinkUp Gold, Pharmax and Axium buying groups.

5.108 It is sufficient for the purposes of this analysis to note closeness of competition between Uniphar and NaviCorp's buying groups in a heavily concentrated market.

The competitive constraint imposed on the market by Axium

<u>The extent to which Axium has been an important provider and innovator in the market</u>

5.109 The Commission has considered the extent to which Axium has been an important provider and innovator in the market for the provision of buying group services in the State. The Commission then considers the potential effect on the market which would be brought about by the Proposed Transaction, which would lead to the removal of NaviCorp as a close and significant independent competitor in the market for the provision of buying group services in the State.

5.110 Uniphar notes that two 'collective buying groups', Pharmasave (which would later become *totalhealth*) and Indepharm, began operating in 2005 and 2008, respectively. According to Uniphar, these groups *"providing discounts for the benefit of [their] members rather than for the financial gain of the group[s themselves]".*[422]

5.111 In 2009, two pharmacists, John Carroll and Patrick Meehan, launched the Axium buying group. Its model differed from Pharmasave or Indepharm, in that it wasn't

[422] Uniphar Response to Phase 2 RFI, Q2.

a co-operative of pharmacies as such, but rather was an independent entity, actively marketing its buying group services to independent pharmacies across the State. As such, Axium was the first 'commercial buying group' in the State.[423]

5.112 NaviCorp noted that

> *"When buying groups initially evolved, their complete focus and that of their members was on the price of the products being brokered to the pharmacies. As more pharmacies joined buying groups, buying groups needed to differentiate themselves in more ways than purely on price alone."*[424]

5.113 NaviCorp went on to note that examples of

> *"the ways in which Navi Group has sought to differentiate Axium include:*

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[423] Uniphar Response to Phase 2 RFI, Q2.

[424] NaviCorp Response to Phase 2 RFI, Q2.

[redacted][425]

5.114 Viatris described Axium as *"a pioneer that brought the buying group business to life by giving independent pharmacies an opportunity to avail of centralised procurement in order to solicit the best commercial offer."*[426] In summary, Axium's creation represented a departure from the business models of the pre-existing buying groups. In that regard, Axium can be seen as the first mover within the market for the provision of buying group services in the State.

5.115 Around the time of Axium's establishment, the full-line wholesalers active in the State created their own respective buying groups. Uniphar established LinkUp in 2010, while United Drug launched Pharma Le Chéile in 2009. Uniphar merged Connect, the buying group of the third full-line wholesaler at the time, Cahill May Roberts Limited (*"CMR"*), into LinkUp in 2013 following its acquisition of CMR. Uniphar credits the full-line wholesalers' entry into the buying group services market to the need for full-line wholesalers to maintain volume of throughput (of POHPPs) [redacted]. Buying groups were one way for full-line wholesalers to *"retain their retail pharmacy customers"*.[427] Viatris also detailed the full-line wholesalers' reaction to Axium's creation:

> *"Mylan* [Viatris was formed by the merger of Mylan and UpJohn in 2020] *would have engaged with Axium as the model group in the industry and over time a second and third buying group came to market – one of which*

[425] NavicCorp Response to Phase 2 RFI, Q2.

[426] Viatris Call Note, dated 6 July 2022, p. 1, saved as "2022.07.27 CCPC Call with Viatris_Redacted.docx".

[427] Uniphar Response to Phase 2 RFI, Q2.

was Uniphar. [Viatris] *stated that wholesalers quickly realised that they would lose out if they did not create their own buying groups."*[428]

5.116 Throughout the Commission's engagement with third parties, the importance of Axium's technology offering has been repeatedly emphasised, albeit it has also been noted by some that the gap between Axium and its competitors has reduced or closed. ROWA, a pharmaceutical manufacturer, identified Axium as the leading buying group in the market, with the group's technology a factor in its success: *"Axium passes so much discounts on to their pharmacies, its technology is more clever, equipped and more innovative. Its technology is clever."*[429] Similarly, *Pure* also views Axium as the market leader. When asked who is seen as the best retail pharmacy buying group in the State, *Pure* responded that:

> *"Axium is far ahead of any other, primarily on the basis of their technology offering and the fact that they were early to the buying group market."*[430]

5.117 Accord, a pharmaceutical manufacturer, also noted how Axium's technology:

> *"encouraged greater compliance in this regard because as pharmacies went to order products from outside the buying group, the IT system would loop them back around to the option that was within the buying group, prompting them to order their supply from the buying group instead.* [Accord] *stated that in the early days this level of compliance stood out to manufacturers but that all of the buying groups have similar compliance technology now."*[431]

[428] Viatris Call Note, dated 6 July 2022, p. 1, saved as "2022.07.27 CCPC Call with Viatris_Redacted.docx".

[429] ROWA Call Note, dated 27 June 2022, p. 3, saved as "2022.06.27 Call with Rowa.docx".

[430] *Pure* Call Note, dated 16 June 2022, p. 2, saved as "2022.06.16 Call with CCPC - non-confidential_Redacted".

[431] Accord Call Note, dated 29 June 2022, p. 4, saved as "CCPC Call Note - CCPC and Accord Healthcare - Redacted".

5.118 Viatris echoed this view, stating that while Axium was a pioneer, other buying groups now have equivalent technology systems in place.[432]

5.119 NaviCorp explained how buying groups have evolved to look beyond exclusively securing discounts for their members, and now look to provide additional services to differentiate themselves relative to other buying groups.[433] [redacted][435]

5.120 In the Written Response, the Parties made the following points:

> *"The Commission notes both Uniphar's comment in its Phase 2 RFI Response that "Axium and Pharmax's technology offering would be superior to that of LinkUp Gold." This suggests that Axium's technology offering is on par with Pharmax's and hence cannot be considered a source of competitive advantage nor a unique product feature that competitors are not able to replicate."*[436] The Parties also point to two calls between the Commission and Viatris and Accord, both of whom stated that Axium had been leaders, but that other buying groups have caught up.[437]

> "[redacted]"[438]

[432] Viatris Call Note, dated 6 June 2022, p. 1, saved as "2022.07.27 CCPC Call with Viatris_Redacted".

[433] NaviCorp Response to the Phase 2 RFI, Q2.

[434] NaviCorp Response to Phase 2 RFI, Q 28.

[435] There are three providers of dispensary platforms on the market: McLearons, TouchStore, and Clanwilliam Health (Helix).

[436] Written Response, paragraph 8.50.

[437] Written Response, paragraphs 8.51 and 8.52.

[438] Written Response, paragraph 8.53.

5.121 The Commission recognises that some of NaviCorp's innovations in the buying group market have been replicated within the market. However, NaviCorp has consistently innovated to create and maintain its market leading position and differentiate itself from others. This has created a dynamic whereby other parties have had to follow in order to compete. NaviCorp has then continued to further innovate and differentiate itself. [redacted] [439]

5.122 Furthermore, the Commission notes the Parties' Submission on Efficiencies, in which the Parties stated that an efficiency of the Proposed Transaction would be *"Navi superior technology [becoming] available to Uniphar pharmacies"*, noting that *"this efficiency cannot be replicated through contractual means short of merger […] This is demonstrated by the fact that these benefits have not been achieved currently."*[440] This statement demonstrates that NaviCorp has been a leader in technology and that replicating its technology is difficult for competitors.

5.123 The Commission's view is that Axium entered the market as an innovator and has continued to innovate over time, albeit its role as an innovator has reduced slightly since it originally entered the market. In the counterfactual, the Commission would expect that Axium would remain an innovator. Axium has historically been a strong competitor and innovator in the market. While Axium's ability to innovate would not necessarily be lost as a consequence of the Proposed Transaction, the Commission is concerned that competitors—either the merged entity or the

[439] As noted in paragraph 4.20 above, NaviCorp stated [redacted]

[440] Parties' Submission on Efficiencies, p. 1.

remaining third party competitors in the market—would not be likely to have a strong incentive to replace this competitive constraint following the implementation of the Proposed Transaction.[441]

Axium as an independent buying group

5.124 Both Uniphar and United Drug, the two full-line wholesalers in the State, operate two buying groups each. Axium is the largest buying group that is not owned by a wholesaler. Following the implementation of the Proposed Transaction, IndeGo Plus would be the sole remaining independent buying group in the State. IndeGo Plus currently has 5 members. As discussed at paragraph 5.31, [redacted][442] Axium's independence, meaning it is not owned by a full-line wholesaler, was identified by several third parties during engagement with the Commission. On a call with the Commission, the IPU noted that:

> *"if a buying group is independent, then there is the opportunity for it to use collective purchasing power to negotiate better terms with the manufacturers/suppliers for the benefit of the pharmacies, whereas if not independent then the controllable spend can be retained by the wholesaler.* [The IPU] *noted that Axium has traditionally been seen as more aggressive in negotiations than Uniphar/United Drug."*[443]

5.125 Furthermore, the IPU also stated that:

> *"with Axium, NaviCorp had in essence created a third force alongside the two full-line wholesalers which caused prices to go down.* [The IPU] *explained that the concern is without Axium as a driver in price negotiations, that this could reduce the power of pharmacies as customers*

[441] See paragraph 4.11 of the Merger Guidelines which notes that *"competitors* [may] *not have a strong incentive to compete (for example, if they might also benefit from increased prices), also referred to as price accommodation"*.

[442] CommCare Call Note, p. 1, saved as "2022.11.16 Call with Commcare - with Commcare's revisions.pdf".

[443] IPU Call Note, dated 14 March 2022, p. 2, saved as "2022.03.14 Call Note CCPC - IPU Non-confidential_Redacted".

> *in the market for medicines.* [The IPU] *stated that NaviCorp is currently exerting a competitive pressure on both full-line wholesalers.* [The IPU] *summarised that in the period before the emergence of independent buying groups, trading terms for pharmacies had been consistently tightening, but then independent buying groups emerged and helped deliver margin back out to pharmacies. There is a concern that, if Axium as a leading independent is sold to one of the full-line wholesalers, trading terms will tighten once again, particularly in respect of controllable spend."*[444]

5.126 Several pharmacies also raised the position of the two full-line wholesalers in the sector following the implementation of the Proposed Transaction when engaging with the Commission:

> *"its a retrograde step leaving us as pharmacy depending on two wholesalers"*[445]

> *"This merger will not be good for the pharmacy sector in the long-term. The existing lack of competitiveness between Uniphar and United drug is already harmful to pharmacy with each mirroring each other's terms and conditions. There is effectively no competition in the current pharmacy wholesale market and the market needs a third player. Axium have a strong position in the market but if they are wholly owned by one of the existing wholesalers there will be even less competition in the wholesale market"*[446]

[444] IPU Call Note, dated 14 March 2022, p. 2, saved as "2022.03.14 Call Note CCPC - IPU Non-confidential_Redacted".

[445] Pharmacy 14, Response to Commission's first questionnaire, saved as "Pharmacy 14 response_Redacted.pdf".

[446] Pharmacy 18, Response to Commission's first questionnaire, saved as "Pharmacy 18 Response.pdf".

"Yes. Uniphar and McKesson [the owner of United Drug] will dominate the market. I would have joined Axium and Staywell to have some independence from the major wholesalers"[447]

"I am strongly opposed to it. [the Proposed Transaction] I feel that the two wholesalers are in direct competition with independent pharmacies throughout the country. They have bought pharmacies in many locations. When it comes to stock allocations and availability they obviously prioritise their own stores. Axium gave its members strength and protected us from our competitors and from the wholesalers being able to dictate terms of business to us. Without Axium the wholesalers will be able to unilaterally change our discount terms, change our delivery times and service levels. United Drug have already reduced our deliveries to once a day with no Saturday Delivery, if Uniphar does the same to us it will affect the level of customer service we can give our patients and adversely affect our business. This merger will make independent pharmacy in Ireland weaker and we will be left to the mercy of two wholesalers who also double as our competitors."[448]

5.127 Additionally Axium's independence gives it significant negotiating power when negotiating terms and conditions. Buying groups are brokers, whose purpose is to negotiate the best deal possible for their members. NaviCorp's independence means it is the only competitor in the market able to negotiate terms and conditions with both full-line wholesalers. Furthermore, it has scale which gives it significant negotiating power. Indeed, Uniphar has noted the significant impact that losing Axium's custom (or that of Axium's members) would have on its

[447] Pharmacy 20, Response to Commission's second questionnaire, saved as "Pharmacy 20 Response 2nd questionnaire_Redacted.pdf".

[448] Pharmacy 6, Response to the Commission's second questionnaire, saved as "Pharmacy 6 Response Second Questionnaire_Redacted".

wholesale business.[449] An internal presentation titled '*Navi Group Overview*', dated 17 November 2020 noted that, when weighing up the Proposed Transaction, if Uniphar did not acquire NaviCorp it *"*[redacted]*" and "*[redacted]*"*[450]. Axium's ability and incentive to secure wholesale discounts and supply terms from either full-line wholesaler for its members, represents an important dynamic in Axium's role in the buying group services market. To this end, Uniphar noted in *Navi Group Overview* that NaviCorp [redacted]*"*[451] In summary, the loss of Axium as an independent buying group, and the effect of that independence, is an important factor to consider when assessing the impact of the Proposed Transaction.

5.128 The Commission considers that Axium is able to exercise a considerable amount of buyer power which it uses to differentiate itself from others in the buying group market and deliver increased discounts. Axium is a large buying group ([50-60]% of trade value of purchases and [20-30]% of members of the market for the provision of buying group services), and has switched suppliers from United Drug to Uniphar in the past. Therefore, the Commission considers that Axium has substantial buyer power and exercises it to the benefit of retail pharmacies. This buyer power is not replicated by competitors in the market which are either vertically integrated or have a very small presence in the market (IndeGo Plus).

5.129 In the Written Response, the Parties note that *"the Assessment has not raised any vertical effects concerns"* and that *"the Assessment should have provided evidence*

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[449] Uniphar Response Phase 2 RFI, Q1. Also see paragraphs 2.58.-2.62, in relation to Axium not renewing its agreement with United Drug before entering into the Wholesale and Brokerage Agreement with Uniphar in 2015.

[450] Uniphar document "*Navi_17 Nov.pptx.PPTX*", dated 17 November 2020, p. 9, Uniphar Response to Phase 1 RFI.

[451] Uniphar document "*Navi_17 Nov.pptx.PPTX*", dated 17 November 2020, p. 5, Uniphar Response to Phase 1 RFI.

showing that wholesalers would have the ability and incentive to raise price or reduce quality once downstream competitive constraints from Axium would have been removed post-transaction."[452]

5.130 A buying group *"negotiates supply terms* ***(including reduced pricing)*** *with manufacturers of POHPPs on behalf of its members"* (emphasis added).[453] There is an inherent vertical nature to the buying group market, as buying groups are brokers. A primary parameter of (horizontal) competition in the market is the ability to negotiate greater discounts from manufacturers and wholesalers. The Commission observes that Axium's size and independence makes it a strong competitive constraint in the market, as it is the only buying group, of significant scale, with the ability and incentive to seek the best terms and conditions possible from all suppliers in the market. All other buying groups are vertically integrated with either Uniphar or United Drug[454]. A competitive distortion at a horizontal level can be exacerbated by the removal of a vertical constraint. Absent Axium, there will be less competitive pressure at a horizontal level between the buying groups. The loss of that pressure at the horizontal level is exacerbated by the fact that Axium exercises a vertical constraint as well as a horizontal one. This is not to be confused with a vertical effects theory of harm involving input or customer foreclosure—as set out in section 7 below, no plausible vertical effects theory of harm has been identified by the Commission on the basis of the information in its possession and given the relevant counterfactual.

5.131 The Commission's view is that Axium's independence and, in particular, its ability to differentiate itself and bring a competitive pressure to bear on parts of the cost chain that other buying groups do not, would be lost following implementation of the Proposed Transaction.

[452] Written Response, paragraphs 8.57 And 8.58.

[453] Merger Notification Form, Section 5.1.

[454] [redacted]

Barriers to entry and expansion

5.132 The Commission assessed barriers to entry and expansion in the market for buying group services.

5.133 In considering barriers to entry and expansion, the Commission seeks to assess, in relation to the market for the provision of buying group services, the extent to which market power may be constrained by the occurrence or threat of new entry, or by the ability of rivals in the market to profitably expand production. In both cases, the entry and/or expansion needs to be:

- **Timely.** The Commission's Merger Guidelines note that *"the longer it takes for potential entrants to become effective competitors, the less likely it is that market participants will be deterred from causing harm to competition"* and that *"[w]hile entry that is effective within two years is normally considered timely, the appropriate timeframe for effective new entry will depend on the characteristics and dynamics of the market under consideration."*[455]

- **Likely.** The Commission's Merger Guidelines set out that *"[t]he Commission will assess whether a new entrant would be likely to make a commercial return on its investment at or above current premerger market prices taking into account the entry costs involved (including sunk costs that would not be recovered if the new entrant later exited) and the likely responses of incumbent firms"*[456] and that *"[o]ther factors that would affect the likelihood of entry include the level of demand at existing prices, whether demand is growing, the output level the entrant is likely to obtain,*

[455] Merger Guidelines, paragraph 6.5.

[456] Merger Guidelines, paragraph 6.6.

the likely impact of entry on prices post-merger, and the scale at which the entrant would operate".[457]

- **Sufficient.** The Commission's Merger Guidelines set out that *"[f]or entry to be sufficient, it must be likely that incumbents would lose significant sales to new entrants"* and that *"[e]ntry that is small-scale, localised, or targeted at niche segments is unlikely to be an effective constraint post-merger"*.[458]

5.134 The Commission's Merger Guidelines further set out a list of relevant information it will consider in assessing whether entry might act as a competitive constraint post-merger. This includes:

- the history of past entry;
- evidence of planned entry by firms in adjacent or complementary markets or by other firms outside the market;
- evidence indicating the level of investment required;
- evidence indicating the time period over which costs would have to be recovered;
- evidence of the ability of producers that are not competitors to switch production;
- evidence of the extent of brand loyalty; evidence of switching costs;
- the length of contracts between suppliers and customers;
- evidence of the ability and incentive of customers to sponsor entry;

[457] Merger Guidelines, paragraph 6.7.

[458] Merger Guidelines, paragraph 6.8.

- evidence of any growth or decline in the market;
- evidence of a strategy to block or restrict entry through the acquisition of a competitor by an incumbent; and
- and evidence of network effects that impede entry.[459]

5.135 The Commission will first assess barriers to expansion, before progressing to assess barriers to entry. This section contains:

a) Views of the Parties;

b) Views of third parties;

c) The Commission's assessment of barriers to expansion and entry; and

d) The Commission's conclusions on barriers to entry and expansion.

Views of the Parties

5.136 The Parties stated in the Merger Notification Form that there are no significant barriers to entry in relation to the operation of a buying group in the State.[460] Uniphar states in its Phase 2 RFI Response that *"barriers to entry and barriers to expansion into the provision of retail pharmacy buying group services in the State are low."*[461]

5.137 The Frontier Report stated that:

> *"The Assessment has focused on entry and expansion in a highly competitive market, where three players compete vigorously to supply homogeneous products and has concluded that "there are significant*

[459] Merger Guidelines, paragraph 6.18. As noted in paragraph 6.22 of the Merger Guidelines, in assessing whether expansion might act as an effective competitive constraint, the Commission will consider all relevant information, including information similar to that listed in paragraph 6.18 (but with respect to possible expansion).

[460] Merger Notification Form, section 5.3.

[461] Uniphar Response to Phase 2 RFI, Q25.

barriers to entry and expansion in the market for the provision of buying group services in the State, which make it unlikely that a new entrant will enter or an existing competitor will expand in a timely and sufficient manner".

"barriers to entry and expansion for commercial buying group services are low. In particular, firms that are already active in providing similar services face low barriers to expansion, as shown by the fact that most historical examples of previous entry in the buying group services market come from players that already had a foothold in adjacent markets. The Assessment incorrectly focuses on entirely de novo entry rather than considering the low barriers to expansion for adjacent firms."[462]

However, the likelihood of entry and expansion should not be considered in the context of the current competitive conditions. Rather, entry and expansion should be assessed in a hypothetical counterfactual in which the merging parties attempt to introduce a post-merger price increase. If a market is highly competitive today, then one would typically expect to see limited entry due to the limited benefits that can be gained by the entrant. However, if that market became less competitive, one would expect greater levels of entry. Accordingly, it is the extent of barriers to entry and expansion that is the key issue for the competitive assessment, not the existing level of entry. However, to the extent that there is substantial existing entry, that supports the view that barriers to entry and expansion are low." [463]

5.138 In the Written Response, the Parties stated the following:

[462] Frontier Report, paragraph 4(c).

[463] Frontier Report, paragraphs 66-67 and 73b and 73c. See also the Written Response, paragraphs 8.68.2 and 8.74 and 8.99-8.100.

"We note that the fact that common ownership groups and buying groups are separate business models is no indication of the likelihood that a common ownership group will start providing buying group services in the face of a hypothetical post-merger price increase. This is also in contradiction with the Assessment's view that all recent entry has come from expansion of players previously active in adjacent markets (i.e. players with different business models)."[464]

"The lack of historical examples of common ownership groups entering the buying group market does not necessarily provide any indication of the likelihood of future entry. As noted previously, the buying group market has historically been highly competitive. However, a hypothetical post merger reduction in competitive pressure will increase the profitability of expanding into the buying group services market."[465]

"the Commission has failed to interrogate why IndeGo Plus has grown so slowly, despite taking evidence from CommCare. The Commission is wrong to simply assume that IndeGo Plus' slow growth is due to barriers to entry in the market. The slow start in terms of take-up for IndegoPlus in the last 2 years must also be considered in the more general context of the merger between Haven and totalhealth during that period and of disruption caused by the Covid crisis, which is now diminished."[466]

5.139 The Frontier Report concluded the following in relation to barriers to entry and expansion:

"a) The potential barriers to entry identified in the Assessment are not material barriers for a player active in closely related services looking to expand into the commercial buying group services. Such player could

[464] Written Response, paragraph 8.99.

[465] Written Response, paragraph 8.100.

[466] Written Response, paragraph 8.104.

leverage existing assets, IT infrastructure and customer base to rapidly expand in the provision of buying group services.

b) The provision of buying group services is highly dynamic and has seen significant entry in the past. Recent entrants include IndegoPlus, the Chemco Pharmacy Group, and Alitam.

c) There has been significant entry by symbol groups providing buying group services to their members. Symbol groups compete directly with buying groups to acquire new members among independent pharmacies and so provide a constraint on Uniphar's ability to profitably raise prices post-merger.[467]

5.140 In the Written Response, the Parties also provided detailed arguments on the barriers to entry and expansion in the provision of buying group services identified by the Commission in the Assessment. These points are addressed below in the relevant sections.

View of third parties

5.141 The Commission issued an information request to a competitor in the market, United Drug.[468] In its response to this information request, United Drug noted that:

"[a]lthough there are no material barriers to entry, it is difficult to assess any traction a new/alternative offering may bring, due to the size and scale of the market, continued consolidation at manufacturer and retail level plus downward pricing pressure".[469]

[467] Frontier Report, paragraph 79.

[468] The Commission received the United Drug Response to Information Request on 18 July 2022.

[469] United Drug Response to Information Request, Q6, saved as "2022.08.22 CCPC 01.07.22- 22.08.22 Non-confidential_Redacted".

5.142 United Drug further noted that "*[a]ny new entrant would need to proposition their service or offering to both prospective pharmacy business owners and supply side (suppliers / manufacturers to pharmacy sector) for it to make commercial sense*", and that "*Given size of [sic] market, buying groups in play and owned retail chains such as LloydsPharmacy and Boots – the market may be over subscribed regarding the number of buying groups relative to the number of pharmacies available*".[470]

5.143 United Drug concluded that *"notwithstanding the above we do not believe there any [sic] material barriers to entry , once appropriate regulatory licenses are in place and a supply chain infrastructure to support same is available."*[471]

5.144 The Commission spoke with Pfizer. When asked if a new buying group could enter the market, Pfizer explained that *"there would be lots of challenges because the market is very competitive and difficult to get into"* and that *"it would be a difficult business to succeed in as a new entrant."*[472]

5.145 The Commission spoke to a potential new entrant, [redacted] which operates in the [redacted] wholesaling sector in the State. Prior to the Proposed Transaction, [redacted] had looked into a potential acquisition of NaviCorp.[473] [redacted] outlined barriers to entry including *"the technology, the cost, regulatory uncertainty for the future and the current duopoly in wholesale supply,"* further noting that it would be *"unlikely for* [redacted] *to start a buying group from*

[470] United Drug Response to Information Request, Q15.

[471] United Drug Response to Information Request, Q15.

[472] Pfizer Call Note, dated 12 July 2022, p. 1, saved as "CCPC Call with Pfizer_Redacted". The Commission notes that Pfizer represents 2.4% of the market for the supply of POHPPs in the State, according to IQVIA data provided by the Parties in its Written Response. Seven of the eight manufacturers contacted by the Commission had a market share of less than 4% in the supply of POHPPs. The Commission contacted these specific manufacturers as they were provided by the Parties in the Merger Notification Form as being in the top 25 suppliers used either one or both of the Parties for the operation of a buying group for retail pharmacies.

[473] NaviCorp's engagement with [redacted] s outlined in paragraphs 4.22-4.24 and 4.38-4.39.

scratch.”[474] [redacted] further noted, in an email to the Commission, that *“we believe that there are significant barriers to entry other than through acquisition for a new participant to this market which did not have existing market knowledge or expertise.”*[475]

5.146 In a call with the Commission, *Pure* noted that the main barrier to entry in the buying group is capital requirements.[476]

The Commission’s assessment of barriers to expansion and entry

5.147 The Commission’s assessment of the barriers to expansion and entry is set out as follows:

a) Barriers to Expansion in the market for the provision of buying group services.

(i) The history of expansion in the market for the provision of buying group services.

b) Barriers to entry in the market for the provision of buying group services.

(i) Barrier to entry 1 - the ability to secure manufacturer-funded discounts, which are a function of volumes purchased.

(ii) Barrier to entry 2 – the range of services provide by buying groups and set-up costs.

(iii) Barrier to entry 3 – the need for an agreement with a full line wholesaler

[474] [redacted] Call Note Non-Confidential Summary, dated 10 August 2022, p.2, saved as “2022.08.30 [redacted] call note non-confidential summary”.

[475] Email between [redacted] and the CCPC, dated 30 August 2022, saved as “2022.08.30 TS to [redacted] RE call note.msg”.

[476] *Pure* Call Note, dated 16 June 2022, p. 2, saved as “2022.06.16 Call Note with CCPC - non-confidential_Redacted.pdf”.

c) Potential entry or expansion

(i) Potential expansion by existing competitors

(ii) Potential entry by common-ownership groups.

(iii) Potential entry by collective buying groups.

(iv) Potential entry by CMB providers

(v) Potential entry by de novo entrants.

d) The Commission's conclusions.

5.148 First, however, the Commission addresses the Frontier Economics argument that the likelihood of entry and expansion should not be considered in the context of current competitive conditions. Rather, entry and expansion should be assessed in a hypothetical counterfactual in which the merging parties attempt to introduce a post-merger price increase.[477]

5.149 The Commission agrees with this point, noting that the Merger Guidelines state that:

> *"Harm to competition threatened by a merger may also be constrained by the ability of rivals profitably to expand production in response to higher prices. As with new entry, expansion by rivals must be timely, likely, and sufficient to prevent an SLC."*[478]

5.150 The Commission confirms that it has considered barriers to entry and expansion in the context of a hypothetical counterfactual in which the merging parties attempt to introduce a post-merger price increase.

[477] Frontier Report, paragraph 67.

[478] Merger Guidelines, paragraph 6.19.

Barriers to expansion in the provision of buying group services

5.151 The Frontier Report stated that *"[b]uying groups are able to expand the number of pharmacies served at limited cost"* and that *"[o]nce investments to set-up an ordering platform, a supporting IT infrastructure and head office teams have been made, buying groups can scale up rapidly, serving additional pharmacies at limited extra cost"*.[479]

5.152 The Commission has seen no evidence which suggests that, after the initial investments have been made by a provider of buying group services, serving additional retail pharmacists would result in a large increase in fixed costs for the buying group. The costs relating to serving additional retail pharmacies may be primarily operating costs, and therefore not a large barrier to expansion.

5.153 Developing the technology required to be in a strong competitor in the market for the provision of buying group services may be a barrier to expansion for a smaller competitor looking to expand. This would need to be assessed on a case-by-case basis.

5.154 The Commission notes that, in the case of IndeGo Plus, it *"was set up a few years ago, when it was decided to offer a software.* [redacted]*."*[480] While the Commission acknowledges the point that CommCare never focused on the buying group market, it does suggest that simply developing technology and marketing a buying group was not, at least with Axium in the market, enough to grow and achieve scale in the market.

5.155 There may be barriers to expansion associated with support staff. The Commission notes that Axium has [redacted] territory managers who are responsible for recruiting and retaining pharmacies.[481] A competitor wishing to expand in the provision of buying

[479] Frontier Report, paragraphs 22 to 23. See also Written Response, paragraph 8.26.2.

[480] Note of Call between CCPC and CommCare, 16 November 2022, saved as "2022.11.16 Call with Commcare - with Commcare's revisions.pdf".

[481] Written Response, paragraph 5.59.

group services may not need as many recruitment managers as Axium, but considerable investment in a sales force would likely be required to substantially increase membership numbers. A competitor may, therefore want some level of assurance that it will be successful accruing business before committing to expanding operations.

5.156 The Commission is of the view, based on the evidence available, that, once the initial investments have been made, there are not substantial barriers to expansion in the market for the provision of buying group services.

History of expansion in the provision of buying group services

5.157 The information in Table 4 above shows the membership numbers of buying groups in the State from 2018 to 2021. This data shows that LinkUp Gold expanded from [redacted] members to [redacted] members in three years. Axium expanded from [redacted] to [redacted] members during the same period. Indego plus entered in 2020 with five members and remained at five in 2021.[482] As noted in paragraph 5.31 above, [redacted] Furthermore, as noted in paragraph 5.154 above, the case of CommCare suggests a company can in theory enter the market but that the scale and technology barriers to entry, discussed below, may still apply as a barrier to expansion.

5.158 NaviCorp estimates that Pharmax (which is now owned by United Drug) secured [redacted]% of available retail pharmacies within [redacted] of entering the market in 2016.[483] The Commission notes from Table 4 that Pharmax had a share of [10-20]% of pharmacies by 2018, and Pharmax expanded from [redacted] to [redacted] members from 2018 to 2021. The Commission considers that, given the scale and technology already possessed by Pharmax, it is unlikely that the barriers to expansion described above would apply to Pharmax. However, as a buying group owned by United Drug, which would be one of the two remaining competitors of

[482] See also, Frontier Report, paragraph 24.

[483] NaviCorp Response to Phase 2 RFI, Q25(v).

scale in the market following the Proposed Transaction, expansion by Pharmax would not ameliorate any SLC concerns identified by the Commission.

Barriers to entry in the market for the provision of buying group services

Barrier to entry 1: the ability of buying groups to secure manufacturer-funded discounts

5.159 The primary service provided by a buying group is to secure manufacturer-funded discounts for their member pharmacies. As set out in paragraphs 2.40 to 2.49 of Section 2, the level of manufacturer-funded discounts which a buying group will be able to negotiate is a function of:

- a buying group's size (in terms of the number and size of member pharmacies); and,
- its ability to ensure that its members purchase products on which it has secured manufacturer-funded discounts regularly and at sufficient and consistent volumes (referred to as 'compliance'), which is enabled by, among other factors, the buying group's technology and IT systems.

<u>Importance of the size of a buying group</u>

5.160 Before a new buying group can compete effectively, it needs to secure a sufficient number of member pharmacies. NaviCorp notes:

> *"The most important aspect to ensure success of a newly launched buying group is a customer base. A buying group looking to launch will need to communicate their customer list with suppliers before they can negotiate any discount structures with said suppliers. A customer list comprising no more than [redacted] pharmacies would be sufficient to establish a buying group. The initial customer list comprised of [redacted] pharmacies in September 2009."*[484]

[484] NaviCorp Response to Phase 2 RFI, Q25, paragraph 25.3.

"The success of a buying group hinges on its scale and therefore attraction of new members and retention of current members is extremely important".[485]

5.161 Both Parties maintain that small groups of pharmacies can secure manufacturer-funded discounts. NaviCorp cites certain pharmacy groups as evidence that groups of relatively few pharmacies can secure manufacturer-funded discounts, including Pharma Alliance (36 pharmacies),[486] Meaghers Pharmacy (9 pharmacies) and McGreals pharmacies (10 pharmacies). NaviCorp stated that *"customer list comprising no more than* [redacted] *pharmacies would be sufficient to establish a buying group. The initial Navi customer list comprised of* [redacted] *pharmacies in September 2009".*[487] NaviCorp also maintains that manufacturers, particularly generic manufacturers, engage with small groups of pharmacies and single independent pharmacies.[488] Uniphar echoes this view, in the context of compliance-based buying groups, noting that *"smaller groups of compliant members could unlock significant manufacturer discounts and therefore there would be minimal time involved in bringing together a small group of members to initiate a collective buying group".*[489]

5.162 In the Parties' response to the Commission's clarification questions (*"Response to the Commission's Clarification Questions"*), the Parties stated that:

"a buying group's ability to achieve compliance, i.e. to deliver the sales volumes projected to manufacturers, is important to its ability to negotiate manufacturer discounts. [redacted]

[485] NaviCorp Response to Commission's informal questions, Q4, May 3 2022.

[486] Note that Uniphar identifies Pharma Alliance as a "collective buying group." As discussed in Section 3, the Commission's view is that Pharma Alliance is akin to a common-ownership group.

[487] NaviCorp Response to Phase 2 RFI, Q25.

[488] NaviCorp Response to Phase 2 RFI, Q25(vii).

[489] Uniphar Response to Phase 2 RFI, Q25 (viii).

[redacted]

For example, [redacted][90]

5.163 As outlined in paragraphs 2.40-2.49 , manufacturers offer discounts on the basis of a buying group's size (both membership and volume) and compliance. Several manufacturers noted how larger buying groups can secure greater manufacturer-funded discounts. For example, Menarini noted how its *"focus is currently on larger groups who tend to get a better deal and purchase higher volumes".*[491] Similarly, Pfizer stated that they *"negotiate deals based on volume and would have volume thresholds*. [Pfizer] stated *that the more a buying group buys the greater the discount"*[492] and how *"each of the larger buying groups tend to have steady volume demands and so none are particularly aggressive or get treated better than the others".*[493] Pfizer also noted when asked if discounts varied significantly based on volume that *"they would vary marginally"*.[494] Viatris noted that, when asked if there was a specific size or volume that buying groups needed to reach to make negotiations worthwhile, *"any criteria would be about volume but* that [Viatris] *would not call it a negotiation. Viatris will make an offer that will apply unilaterally*

[490] Response to the Commission's Clarification Questions, Q2(a).

[491] Menarini Call Note, dated 30 June 2022, p. 2, saved as "2, saved as "2022.06.30 Call with Menarini_Redacted".

[492] Pfizer Call Note, dated 12 July 2022, p. 2, saved as "CCPC Call with Pfizer_Redacted".

[493] Pfizer Call Note, dated 12 July 2022, p. 2, saved as "CCPC Call with Pfizer_Redacted".

[494] Pfizer Call Note, dated 12 July 2022, p. 2, saved as "CCPC Call with Pfizer_Redacted".

to anyone else in the market who purchases the same level of volume".[495] ROWA also stated that larger buying groups can secure large discounts.[496] Nonetheless, most manufacturers stated that discounts are not solely determined by a buying group's size, but also reflect a buying group's level of compliance.

5.164 The Commission notes the positions of a minority of manufacturers (Teva, Manufacturer X, Accord and GSK):

- Teva: *"*[redacted] *but that there is no strict correlation with buying group size. [Teva] explained that if you take (for example) the generic pharmaceutical market, the competitive nature and market forces are the main influencers on price. This means that smaller groups are capable of achieving good discounts from manufacturers."*[497]

- Manufacturer X: *"a smaller group may have a successful track record in agreement implementation and so [Manufacturer X] would want to negotiate with them irrespective of their smaller size"*[498]

[495] Viatris Call Note, dated 6 July 2022, p. 2, saved as "2022.07.27 CCPC Call with Viatris_Redacted".

[496] ROWA Call Note, dated 26 June 2022, p. 2, saved as "2022.06.27 Call with Rowa_Redacted".

[497] See Teva Call Note, dated 05 July 2022, saved as "2022.07.05 Call with Teva.Teva's comments_Redacted". The Commission notes that Teva represents 3.76% of the market for the supply of POHPPs in the State, according to IQVIA data provided by the Parties in its Written Response. Seven of the eight manufacturers contacted by the Commission had a market share of less than 4% in the supply of POHPPs. According to the parties, Teva is also one of seven generic manufacturers in the State (paragraph 5.11 of the Written Response). The Commission contacted these specific manufacturers as they were provided by the Parties in the Merger Notification Form as being in the top 25 suppliers used either one or both of the Parties for the operation of a buying group for retail pharmacies.

[498] Manufacturer X Call Note, dated 29 June 2022, p. 3, saved as "2022.06.30 Call with Manufacturer x - Non-Confidential_Redacted.pdf".

* Accord: *"[Accord] explained that because the generic market has ample competition, Accord will be open to negotiate with buying groups of all sizes* [redacted].*"*[499]

* GSK: *"the size of a buying group was not necessarily an important factor that GSK would consider. DT elaborated that GSK negotiate with buying groups of varying sizes partially because they trade and compete against parallel importers and therefore, they will engage with whatever customers are available."*[500]

5.165 Small groups of pharmacies such as *Pure* and Pharma Alliance are able to negotiate discounts from manufacturers, but there is no evidence to suggest that they are able to secure the same level of discounts as a larger group. It is also important to note that they are groups of commonly-owned pharmacies and do not offer buying group services to independent pharmacies. Consequently, they have high levels of compliance by default and do not require technology or other resources to drive compliance.

5.166 NaviCorp stated in their Phase 2 RFI response that:

> *"economies of scale can be beneficial on the basis that having a higher level of guaranteed volume allows a buying group to negotiate most effectively with manufacturers. However Table 2 [below as Table 8] demonstrates that a buying group can operate effectively with a relatively small membership base".*

Table 8: Growth in Axium's Membership

[499] Accord Call Note, p. 3, saved as "CCPC Call Note - CCPC and Accord Healthcare Confidential."

[500] GSK Call Note, p. 2, saved as "2022.07.05 Call with GK (002) V2. The Commission notes that GSK represents 1.38% of the market for the supply of POHPPs in the State, according to IQVIA data provided by the Parties in its Written Response. Seven of the eight manufacturers contacted by the Commission had a market share of less than 4% in the supply of POHPPs. The Commission contacted these specific manufacturers as they were provided by the Parties in the Merger Notification Form as being in the top 25 suppliers used either one or both of the Parties for the operation of a buying group for retail pharmacies. GSK Call Note, p. 2, saved as "2022.07.05 Call with GK (002) V2".

Growth in Axium's Membership		
Year	**No. of members**	Average Weeks to add 1 Pharmacy
2009 (September)	[redacted]	
2010 (June)	[redacted]	[redacted]
2011 (June)	[redacted]	[redacted]
2012 (May)	[redacted]	[redacted]
2013 (April)	[redacted]	[redacted]
2014 (December)	[redacted]	[redacted]
2015 (December)	[redacted]	[redacted]
2016 (December)	[redacted]	[redacted]
2017 (December)	[redacted]	[redacted]
2018 (December)	[redacted]	[redacted]
2019 (December)	[redacted]	[redacted]
2020 (December)	[redacted]	[redacted]
2021 (December)	[redacted]	[redacted]

Source: NaviCorp Response to Phase 2 RFI[501]

5.167 While discussing Axium's success, Teva stated that:

> *"lots of factors have impacted on Axium's success. [Teva] explained that from a supplier's perspective, their members' consistency in buying supply has made their [Axium's] relationship with Teva and others strong. Axium can demonstrate high levels of compliance. This strong relationship with suppliers benefits Axium's member pharmacies during negotiations.*

[501] NaviCorp Response to Phase 2 RFI, Q25(v), Table 2.

[Teva] stated that as Axium grew they were able to get terms and conditions that weren't available elsewhere in the buying group market."[502]

5.168 The Commission's engagement with manufacturers, retail common-ownership groups and other pharmacy groups indicated that many manufacturers will engage with relatively small groups of pharmacies. However, several manufacturers reiterated that manufacturer-funded discounts are to an extent determined by group size and compliance.[503] Many of the small groups which engage with manufacturers, including those cited by the Parties, such as Pharma Alliance, are under common-ownership and can therefore offer high levels of compliance by default. A new independent buying group would not own its member pharmacies, and would not be able to offer comparable levels of compliance to manufacturers as that offered by small commonly-owned groups.

5.169 On the basis of the evidence available to it, the Commission understands that, while it may be possible for a buying group with a small number of member pharmacies to engage with manufacturers, a buying group's ability to secure comparable discounts would be based on the volumes and compliance levels which it could guarantee to manufacturers. So, while this may be possible for small commonly owned groups, who do not offer buying group services to independent pharmacies, in practice buying groups made up of independent pharmacies require some minimum number of member pharmacies in order to be able to provide a sufficient competitive constraint.

5.170 In order to establish whether it would be possible for a new entrant to achieve sufficient scale within a reasonably short time, the Commission considers that it is instructive to look at the way in which the buying groups currently operating in

[502] Teva Call Note, dated 05 July 2022, p. 3, saved as "2022.07.05 Call with Teva.Teva's comments_Redacted".

[503] Menarini Call Note, dated 30 June 2022, p. 2, saved as "2022.06.30 Call with Menarini_Redacted".

the State were established. The Commission understands that these buying groups have the following origins:

- **Launched by independent pharmacists**. The Parties note, in their Written Response, that co-operative or collective buying groups have been launched, which include: United Pharmacists Co-Operative and Allied Pharmaceutical Distributors which would later become Uniphar; Pharmasave, which became the Total Health symbol group; and Indepharm, which evolved into the Haven symbol group.[504] Axium was launched in the State in 2009 by two pharmacists. It did not have a number of pharmacies attached to it via an adjacent business, either wholesaling, CMB, or common ownership. An important feature of Axium, which may differentiate it from collective or co-operative buying groups, as well as from common-ownership groups, is that it actively competes for the business of independent pharmacies. It is also important to note that the buying group services market did not exist in 2009 in the form that it does today[505]—to the Commission's knowledge, a large proportion of independent pharmacies at that time did not use buying group services at all.

- **Launched by an existing wholesaler**. Following the launch and commercial success of Axium, Uniphar and United Drug each launched a buying group in the State, LinkUp and Pharma Le Chéile, respectively.[506] Cahill May Roberts Limited (*"CMR"*) also established a buying group called

[504] Written Response, paragraphs 8.65 – 8.67.

[505] Uniphar described Axium as the first commercial buying group in the State, and contrasted it with existing cooperative or collective buying groups active in the State at the time. See Uniphar Response to Phase 2 RFI, Q2, p. 16.

[506] Uniphar Response to Phase 2 RFI 2, 'Buying Groups', pp. 3-5.

Connect, which was merged with LinkUp in 2013 following the acquisition by Uniphar of CMR.[507]

- **Launched by an existing CMB or common-ownership group.** Uniphar have noted that existing symbol groups and common-ownership groups already have the requisite infrastructure to enable them to *"very easily re-repurpose this to establishing buying groups"*.[508] Indepharm launched the IndeGo Plus buying platform for independent pharmacies in 2020, having previously only been available to members of the *totalhealth* symbol group.[509] Indepharm and *totalhealth* are both in the same ownership group of CommCare.

5.171 On the basis of this historical entry into the market, the Commission observes that all entrants to the market, with the exception of NaviCorp, which entered as an innovator, have had access to an existing customer base of independent pharmacies. In recognition of Uniphar's position in the supply chain, Uniphar acknowledged:

> *"LinkUp and LinkUp Gold were of course established by Uniphar, a full line wholesaler, and* [redacted]*".*[510]

5.172 In considering whether a new entrant could replicate NaviCorp and enter the market without an existing base of pharmacy customers from an adjacent or downstream market, the Commission first notes that NaviCorp said that [redacted] member pharmacies would be sufficient to establish a buying group.[511] NaviCorp

[507] For more information, see: M/12/027 – Uniphar/CMR.

[508] Uniphar Response to Phase 2 RFI, Q25.

[509] Uniphar Response to Phase 2 RFI, Q25.

[510] Uniphar Response to Phase 2 RFI, Q25(ix).

[511] NaviCorp Response to Phase 2 RFI, Q25(i).

notes that Axium had an initial customer [membership] list of [redacted] pharmacies in 2009. However, as NaviCorp also notes, at that time the vast majority of pharmacies handled purchasing in-house.[512] Therefore a group comprising a small number of pharmacies offered manufacturers a single point of negotiation that was not previously readily available. [redacted][513]

5.173 Axium's initial growth took place when most independent pharmacies were not members of buying groups. As the vast majority of independent retail pharmacies are members of buying groups, a new entrant today would likely have to entice customers to join instead of (or in addition to) the buying group(s) of which they are already a member. The Commission observes that this would be highly time and resource-intensive for the new entrant, and would require convincing a pharmacy to join an unproven new competitor which had not yet begun operations. While the Commission understands that manufacturers will engage with groups of relatively few pharmacies, a key consideration is the ability to guarantee volumes and compliance. One manufacturer noted how *"a new entrant to the buying group market is feasible but it would be very challenging…this is because Axium's members already consist of the key pharmacies in Ireland."*[514] Even if a new entrant was to generate membership through multi-homing, its ability to generate competitive discounts is a function of volumes and compliance, not membership, and multi-homing is likely to reduce compliance levels.

5.174 Given the current degree of concentration in the buying group services market, and the need to gain membership and purchasing volumes from the incumbents, it is unlikely whether any entry would be sufficient, likely and timely to counteract

[512] NaviCorp Response to Phase 2 RFI, Q25(v).

[513] NaviCorp Response to Phase 2 RFI, Q25(v).

[514] ROWA Call Note, p. 3, saved as "2022.06.27 Call with Rowa_Redacted".

any reduction in competition resulting from the Proposed Transaction. The Commission notes Indepharm's market share is around [0-10]% after approximately two years of supplying standalone buying group services in the State.

5.175 In terms of existing CMB providers, there are currently five symbol groups in the State—operated by Uniphar NaviCorp and Indepharm—all of whom already operate buying groups in the State. Given there are no other full-line wholesalers or symbol groups in the State, it is not currently possible for an existing full-line wholesaler or symbol group to enter the market for the provision of buying group services because they are already present in the market.

5.176 In their Written Response, the Parties contend that the Commission *"[did] not consider the full spectrum of players providing adjacent services. Most notably, this includes common ownership groups and collective buying groups."*[515] The Parties consider that these groups *"already provide buying group services to their closed set of members. They currently guarantee high levels of compliance as acknowledged by the Assessment and the addition of external members will further increase their buying power. Further, they also already have agreements with wholesalers in place."*[516]

5.177 The Commission will consider possible entry by specific common-ownership groups or collective buying groups in paragraphs 5.224 – 5.236 below, but notes at this point that these groups have closed sets of members which compete directly with the independent pharmacies they would, in a scenario in which they enter the market for the provision of buying group services, be offering services to.

Importance of technology

[515] Written Response, paragraph 8.71.

[516] Written Response, paragraph 8.72.

5.178 As retail pharmacies purchase products from full-line wholesalers electronically, buying groups need to have access to a suitable ordering platform. The main buying groups in the State operate their own ordering platforms. Axium operates its own ordering platform, as does Pharmax, both of which were developed in-house. LinkUp Gold's ordering platform is known as [redacted], and was developed by a [redacted] Beyond ordering platforms, Uniphar noted that:

> *"At a basic operational level retail pharmacies are interested not only in the technology which powers the buying platform, but also the broader technology offerings from buying groups such as the PCRS Claims support services and analytics".*[517]

5.179 The Commission's engagement with third parties indicated that the investment and/or resources required to establish and operate a buying group is substantial. Menarini noted during a call with the Commission that it was:

> *"aware of the huge investment and technological development that the Navi Group have made in evolving the industry to where it is currently. [Menarini] expressed that would be a huge barrier to entry as new competitors will have an abundance of catch-up to do. [Menarini] acknowledged that Pharmax have begun to try compete with Axium in terms of technology but whether there is scope for another decent sized buying group is another question. [Menarini] stated that it is unlikely a new entrant will be economically viable as pharmacies across the Irish market are continually acquired by the existing bigger groups"*.[518]

[517] Uniphar Response to Phase 2 RFI, Q6.

[518] Menarini Call Note, dated 30 June 2022, p. 4, saved as "2022.06.30 Call with Menarini_Redacted".

5.180 Pharma Alliance detailed the challenge it would face in offering buying group services in order to compete with existing buying groups in the State (Axium, LinkUp, Pharmax etc):

> *"[The CCPC] noted that Pharma Alliance do not provide an ordering platform but that they are comparable to buying groups in the sense that they carry out collective buying. On this basis, [The CCPC] asked how challenging would it be for Pharma Alliance to start providing buying group services in order to compete with existing groups. [Pharma Alliance] explained that it would be too complicated to scale up their operations to buying group level. [Pharma Alliance] said that [they do their] tenders on Excel every 12-18 months. Without anybody else on the purchasing team scaling up is not an option. [The CCPC] asked if it would be correct to say that the investment necessary to compete with buying groups is considerable. [Pharma Alliance] confirmed that is exactly right."*[519]

5.181 Reflecting such demand, Axium and Pharmax also offer their members PCRS claims software, known as Ignite and Arc respectively. [redacted] LinkUp Gold does not [redacted].[520]

5.182 [redacted] The Parties maintain that the requisite technology can be acquired off the shelf from third party suppliers.[521] The Commission notes that the examples of technology developed

[519] Pharma Alliance Call Note, dated 29 July 2022, p. 4, saved as "2022.07.29 CCPC Call with Pharma Alliance_Redacted".

[520] Uniphar Response to Phase 2 RFI, Q6.

[521] NaviCorp Response to Phase 2, RFI, Q25(iv).

and provided by buying groups to date have not been bought off-the-shelf, but rather have been developed either in-house or as a bespoke service.

5.183 A new buying group would need to compile its members' purchasing data to calculate purchasing volumes, and in turn present this information to manufacturers when negotiating manufacturer-discounts. On a call with the Commission, Pharma Alliance explained the role of data in its negotiations with manufacturers:

> *"the collection of this data was key to their establishment and that they [Pharma Alliance] currently utilise a company called Real World Analytics to assist in doing so. [Pharma Alliance] explained that Real World Analytics is a tool for head office systems that gathers the key information that Pharma Alliance uses for their tenders. The system complies the data in an easily accessible manner. [Pharma Alliance] stated that this company is available to everyone in Ireland and therefore, there is not necessarily a huge hurdle for new competitors to avail of it but he continued to say that he does not see huge value for new competitors"*.[522]

5.184 A further function of buying group technology is to drive compliance. Certain manufacturers noted how technology plays a key role in driving compliance. ROWA detailed how Axium's technology is one of the best operated by buying groups in the State:

> *"Axium passes so much discounts on to their pharmacies, its technology is more clever, equipped and more innovative. Its technology is clever. For example, if an independent pharmacy decides to buy a product direct from the manufacturer rather than through Axium, Axium will produce a report at the end of the month, stating how much that pharmacy lost in the month by purchasing its products outside the buying group. It assists Axium in securing their membership because if a pharmacy orders*

[522] Pharma Alliance Call Note, p. 3, saved as "2022.07.29 CCPC Call with Pharma Alliance_Redacted".

products outside of the buying group's negotiated deals, the monthly report details how much they would have saved if they kept their supply within the group".[523]

5.185 Similarly, Accord noted:

"Axium's technology encouraged greater compliance in this regard because as pharmacies went to order products from outside the buying group, the IT system would loop them back around to the option that was within the buying group, prompting them to order their supply from the buying group instead".[524]

5.186 In paragraph 5.167 above, the Commission noted Teva's view on the importance of driving compliance to Axium's success.

5.187 On the basis of the above evidence, operating an effective technology platform that incentivises member pharmacies to purchase products for which buying groups have negotiated manufacturer-discounts is central to driving compliance. Uniphar has noted that "*[b]uying groups negotiate with manufacturers based on volume and compliance. Therefore, at its most simplistic, the greater the scale (i.e. volume) the better the discounts the buying group should be able to unlock from manufacturers*" though they also noted that "*generic manufacturers which are not the preferred …suppliers to buying groups and symbol groups will often offer strong discounts directly to independent pharmacies on direct sales. Examples would include Clonmel, Pinewood and Rowex – with Clonmel and Pinewood in particular preferring a direct to pharmacy route to market*."[525]

5.188 The Parties maintain that no technology, or no significant technology, is required to create and operate a buying group. Uniphar stated:

[523] ROWA Call Note, p. 3, saved as "2022.06.27 Call with Rowa_Redacted".

[524] Accord Call Note, p. 4, saved as "CCPC Call Note - CCPC and Accord Healthcare – Redacted".

[525] Uniphar Response to Phase 2 RFI, Q25(vii).

"There are no costs involved in setting up a collective buying group which focuses narrowly on securing discounts from manufacturers. For example, Pharmacy Alliance was established quickly and easily among a group of pharmacies. It has no head office, no website, and is likely being run with minimal technology, e.g. an Excel file".[526]

5.189 Similarly, NaviCorp noted:

"While an IT platform is beneficial to allow for growth and streamlining communication with customers, it is not necessary to operate a buying group. For example, as far as Navi is aware, both Pure & Pharmacy Alliance do not have IT buying platforms but instead use a manual process. totalhealth and Haven pharmacy both used manual processes from their initial establishment until totalhealth assisted with the establishment of Pharmax in 2016 and Haven developed their own Indego platform in 2019".[527]

5.190 In the Written Response, the Parties stated that *"[w]hile technology has become a useful tool in driving compliance, the necessary technology is readily available today to license from third parties. As such, smaller size buying groups can achieve compliance without needing to invest in technology development."*[528] The Parties further note that *"Business analytics/ Claims analysis technology is not necessary. For example, Uniphar continue to use a manual system. However, even if it were necessary, claims analysis software, comparable to Navi's iGnite technology, is available for a buying group to purchase."*[529]

[526] Uniphar Response to Phase 2 RFI, Q25(i).

[527] NaviCorp Response to Phase 2 RFI, Q25(iv).

[528] Written Response, paragraph 5.54.

[529] Written Response, paragraph 5.57.

5.191 The statement that *"claims analysis software, comparable to Navi's iGnite technology, is available for a buying group to purchase"* is contradicted in the Efficiencies Submission, in which the Parties identify a claimed efficiency of the Proposed Transaction: *"*[redacted]*"*.[530] Specifically, they state that:

> *"*[redacted]*"*,

and that:

> *"*[redacted]*"*[531]

5.192 Speaking to barriers to entry in the market for the provision of buying group services, [redacted] noted*:*

[530] Parties' Submission on Efficiencies, p. 1.

[531] Parties' Submission on Efficiencies, p. 1.

"[redacted]"[532]

"[redacted]"[533]

5.193 NaviCorp have also noted how Axium initially operated a manual ordering process (akin to Pharma Alliance), but, *"felt that developing an electronic ordering platform would be beneficial for scaling up the business and also attractive to members. Accordingly, Axium developed an electronic ordering platform that linked with the pharmacy dispensing systems"*.[534]

5.194 Consequently, on the basis of the evidence available to the Commission, it seems likely that a new buying group would need to operate technology akin to that operated by the buying groups currently in the market in order to drive compliance and secure competitive manufacturer-funded discounts. While off-the-shelf options are available, the evidence available to the Commission suggests that there is a considerable amount of cost and time to develop a technology offering of the level Axium offers. A new entrant, with an (initially, at least) inferior technology to the incumbent buying groups of Uniphar (following the acquisition

532 [redacted] Call Note, dated 22 August 2022, saved as "2022.08.30 [redacted] call note confidential".

533 [redacted] Call Note, dated 22 August 2022, saved as "2022.08.30 [redacted] call note confidential".

534 NaviCorp Response to Phase 2 RFI, Q25(iv).

of Navicorp) and United Drug is likely to be at a considerable competitive disadvantage.

Barrier to entry 2: set-up costs required to provide a range of buying group services

Range of services

5.195 The primary purpose of buying groups is to secure discounts for their member pharmacies. Importantly, by aligning themselves with a full-line wholesaler (see also Barrier 3 below), buying groups seek to offer to their customers discounts on a wide range of products from multiple manufacturers and short-line wholesalers/parallel importers, such that the buying group member should be able to source the vast majority of their requirements via the buying group. This means that buying groups need to negotiate discounts with a sufficient number of manufacturers to be attractive to pharmacies.

5.196 In addition, the market for the provision of buying group services has evolved to see buying groups offering additional services to their members, such as claims analysis, category management and business analytics (see previous discussion in relation to claims analysis and business analytics in paragraphs 5.190 - 5.191). The Parties have detailed the demand for these additional services from pharmacies:

> *"As more pharmacies joined buying groups, buying groups needed to differentiate themselves in more ways than purely on price alone. This has seen a greater emphasis on buying groups supplying additional services to their members."*[535]

> *"Navi expects demand for buying group services to* [redacted] *There are independent pharmacies who do not wish to avail of the full common management and branding services who [sic] but do demand and require a range of* [redacted]

[535] NaviCorp Response to Phase 2 RFI, Q2.

[redacted]"[536]

"In response to the evolution in their customer's needs, buying groups will continue to expand and enhance the range of retail support services which they offer."[537]

5.197 In the Written Response, the Parties noted that:

"[C]ommon ownership groups already provide full range of services to owned pharmacies in the group. As such, they would be able to compete with commercial buying groups on the full spectrum of services offered. …Uniphar submitted that net price and range of POHPPs available are the most important area of competition between buying groups, while technology and range of additional retail support services are perceived of secondary importance."[538]

5.198 Accord also highlighted the role additional services play within the buying group services market:

"[Accord] explained that if he was a pharmacy looking to join a buying group, his decision would not be based solely on price as all are nearly equivalent. The differing factor from one group to the next is the range of

[536] NaviCorp Response to Phase 2 RFI, Q3.

[537] Uniphar Response to Phase 2 RFI, Q3.

[538] Written Response, paragraph 8.88-8.89.

services that they provide in terms of continuity of supply, price transparency through accessible monthly reports, etc."[539]

Set-up costs and industry expertise

5.199 Buying groups do not obtain ownership of any pharmaceutical products as pharmacies purchase buying group-negotiated products directly from full-line wholesalers. As noted in paragraph 2.55, buying groups need to obtain a brokerage licence from the HPRA pursuant to the Falsified Medicines Directive (Directive 2011/62/EU). However, the cost of obtaining this licence does not appear to be significant.[540]

5.200 Buying groups also employ various sales, marketing and customer services staff. NaviCorp employs [redacted] territory managers who are responsible for recruitment. The Parties maintained that the investment required to establish and operate a pharmacy buying group is small. NaviCorp estimated, in relation to staffing and office facilities, that the following would need to be invested to be competitive:

[redacted].[541]

5.201 Uniphar stated that it has no records of the costs incurred by Uniphar owing to LinkUp's establishment in 2010, but maintain they would have been [redacted].

[539] Accord Call Note, p. 3, saved as "CCPC Call Note - CCPC and Accord Healthcare – Redacted".

[540] To register for a brokerage licence the applicant must have a registered address where its brokerage activities take place. NaviCorp maintain the process of obtaining this licence typically takes eight weeks, and expect it would not take longer than three months. The HPRA may also conduct an inspection of the applicant's premises, systems and standard operating protocol. The initial registration fee is €280. Should an inspection be carried out, an inspection fee per day per person of €1,675 is charged.

[541] NaviCorp Response to Phase 2 RFI, Q25(i).

Uniphar detailed how their [redacted]

"The costs incurred in setting up the LinkUp Gold buying group in 2017 were [redacted] *The only real cost was* [redacted] *Because LinkUp Gold was designed to operate as a silent symbol, Uniphar* [redacted]"[542]

5.202 The Commission notes that this point may indicate a difference between the set-up costs which may be incurred by an undertaking already in an adjacent market in the industry which can leverage existing resources, and an entrant from outside the industry.

5.203 The Commission also held a call with [redacted]. NaviCorp detailed how they had engaged with [redacted] as to a potential sale prior to agreeing the Proposed Transaction with Uniphar.[543] On the call [redacted] was asked if it had considered creating a buying group from scratch:

[redacted]

[542] Uniphar Response to Phase 2 RFI, Q25(ii).

[543] Navi Response to Phase 1 RFI, Q20.

[redacted][544]

5.204 In the Written Response, the Parties pointed out that common-ownership groups *"already provide a full range of services to owned pharmacies in the group. As such, they would be able to compete with commercial buying groups on the full spectrum of services offered."*[545] The Commission deals with the possibility of entry into the market for the provision of buying group services by common-ownership groups in paragraphs 5.224 to 5.236.

5.205 In the Written Response, the Parties noted that *"Uniphar submitted that net price and range of POHPPs available are the most important area of competition between buying groups, while technology and range of additional retail support services offered are perceived of secondary importance."*[546] The Commission does not dispute the primary importance of price and range of POHPPs, but considers that it does not necessarily follow that technology and range of additional services are therefore unimportant parameters of competition.

5.206 Therefore, on the basis of the above evidence the Commission considers that a new buying group would likely need to offer its members services beyond those directly related to discounts, in order to compete with incumbent buying groups which offer a wider range of services. The Commission also considers that supplying buying group services at scale would entail planning, staffing, set-up costs and business development in order to enter the market.

Barrier to entry 3: buying group – full-line wholesaler agreement

[544] [redacted] Call Note, dated 10 August 2022, saved as "2022.08.22 [redacted] all note confidential".

[545] Written Response, paragraph 8.88.

[546] Written Response, paragraph 8.89.

5.207 As outlined in paragraph 2.22, buying groups do not purchase products or physically supply products to their members. Therefore, buying groups require an agreement with a full-line wholesaler[547] to enable the products on which they have negotiated discounts to be supplied to their members. In essence, buying groups need to utilise the full-line wholesalers' infrastructure. This agreement governs various aspects of supply and payment.

5.208 The Commission understands that NaviCorp's Wholesale and Brokerage Agreement with Uniphar governs Uniphar's wholesale supply terms for Axium members, [redacted][548] It also details related conditions, such as [redacted] Consistency of supply is a key concern for pharmacies, underlying the importance of the terms agreed by buying groups with full-line wholesalers.[549] NaviCorp previously had such an agreement with United Drug, before switching to Uniphar in 2015. [redacted]

> [redacted]

[547] The Commission understands that Axium members can choose a primary full-line wholesaler while LinkUp Gold members are obliged to use Uniphar.

[548] NaviCorp document "*Uniphar-Thera Pharmaceutical Wholesale Agreement*", dated 15 December 2015, NaviCorp Response to Phase 1 RFI. See terms 29 through to 47. Also see NaviCorp Response to Phase 1 RFI, Q4 and NaviCorp Response to Phase 2 RFI, Q8.

[549] Supplementary Economics Report, p. 6. [redacted] see NaviCorp Response to Phase 1 RFI, Q6.

[redacted] [50]

5.209 Evidently, a new buying group would need to enter into an agreement with Uniphar or United Drug. As Uniphar noted, "[redacted]"[551] The pivotal position held by the two full-line wholesalers has also been noted by manufacturers. ROWA stated the industry had evolved in a way that for a buying group to be successful, it must have a strong relationship with a wholesaler.[552] Following the implementation of the Proposed Transaction, the vast majority of buying groups (representing [90-100]% of market share) operating in the State would be owned by Uniphar or United Drug, resulting in what Viatris, another manufacturer, described as *"full control of the supply chain [sitting] with the wholesalers."*[553] Uniphar has itself recognised the central role it holds in the supply chain and wider pharmaceutical sector in the State, describing itself as an *"essential part of the national infrastructure."*[554] [redacted].[555]

5.210 Following the implementation of the Proposed Transaction, the need for a new buying group to enter into such an agreement gives both full-line wholesalers considerable leverage. The necessity of an agreement requires Uniphar and United Drug, which would represent [90-100]% of the buying group services market and 100% of full-line wholesaling, to sanction and facilitate the entrant of a new competitor, one which would compete with their own buying groups.

550 NaviCorp Response to Phase 2 RFI, Q31(ii).

551 Uniphar Response to Phase 2 RFI, Q31(i).

552 CCPC call with ROWA, dated 27 June, 2022 p. 3, saved as "2022.06.27 Call with Rowa_Redacted".

553 CCPC call with Viatris, dated 6 July, p. 3, saved as "2022.07.27 CCPC Call with Viatris_Redacted".

554 Uniphar document "Allcare Franchise Model Overview – 2021", slide 2, Uniphar Response to Phase 2 RFI.

555 Navi Response to Phase 2 RFI, Q8.

Additionally, either full-line wholesaler could utilise its position as one of only two full-line wholesalers in the State to offer preferential terms to its own buying groups compared to a new entrant. Uniphar currently provides [redacted] Uniphar states:

> *"As the full line wholesalers have the opportunity to* [redacted] *LinkUp, LinkUp Gold, Pharma Le Chéile and Pharmax also* [redacted] *In sum, Axium, as it is not owned by a full-line wholesaler, would* [redacted]*"*[556]

5.211 In their Written Response, the Parties made three points in response to the Commission's assessment of Barrier 3. These are:

- *"Axium was able to considerably grow its membership base while being independent from United Drug and Uniphar.* [redacted]*"*[557]
- *"the Assessment cites Uniphar being able to offer* [redacted]

[556] Uniphar Response to Phase 2 RFI, Q61(iii).

[557] Written Response, paragraph 8.93.

[redacted] *We note that the rapid growth of Axium suggests that this can hardly be considered a material advantage benefitting Uniphar's buying groups at the expense of Axium."*[558]

- *"the Assessment fails to consider the competitive dynamics at the wholesale level. Wholesalers provide homogeneous products and can serve additional demand at limited extra cost. Any new buying group entrant, as well as any independent pharmacy or other party, can approach both full-line wholesalers for their best offer. Given that additional volume traded by the FLWs increases their profit, each full-line wholesaler will want to make the better offer, resulting in a competitive price for the new buying group."* [559]

5.212 In relation to the first and second points, the Commission notes that, as set out in paragraphs 5.111 and 5.170, Axium's initial growth took place in a different market environment, when a large proportion of independent pharmacies were not members of buying groups and the market itself was developing. As noted by Uniphar, Axium was the first 'commercial buying group' in the State.[560] A new entrant would face significantly different competitive conditions, and would be entering a market in which the two full-line wholesalers operate the largest buying groups in the State. In the Written Response, the Parties state that:

> *"Navi considers that a new entrant would in fact be able to grow at a significantly faster rate as pharmacies now accept that buying groups help streamline purchasing operations and reduce the management/administrative time associated with purchasing whereas*

[558] Written Response, paragraph 8.94.

[559] Written Response, paragraph 8.95.

[560] Uniphar Response to Phase 2 RFI, Q2, p. 16.

Navi faced an uphill struggle trying to convince pharmacies of the benefit of buying groups."[561]

5.213 The Commission acknowledges the challenge NaviCorp faced in entering the market and growing initially, and notes it did so as an innovator. However, unlike when Axium was established, a new entrant today or in future would be entering a market that has:

a) two strong incumbent competitors established;

b) very limited scope for growth in terms of total membership numbers; and

c) historically seen very low levels of switching.

5.214 In relation to the third point, it is not the Commission's intention to assess the degree of homogeneity between Uniphar and United Drug's wholesale offers, as it is not relevant to the assessment of this theory of harm. As set out in paragraphs 5.127 to 5.128, Axium's existing scale and volumes gives it negotiating power with the full-line wholesalers to negotiate more favourable terms and conditions. Indeed, as highlighted in paragraphs 5.46 to 5.49, the prospect of losing Axium's business to United Drug forms a significant part of the rationale for the Proposed Transaction. The Commission does not consider that a new entrant, with a smaller membership base, would necessarily be able to negotiate the same wholesale supply terms and conditions as Axium. As noted previously in paragraphs 5.54 to 5.55, Uniphar has acknowledged that [redacted]

5.215 In summary, on the basis of the evidence available, the Commission's view is that a new entrant to the market would not (initially, at least) have the same degree of negotiating strength as Axium. Therefore, neither Uniphar nor United Drug may

[561] Written Response, paragraph 8.79.

have a strong incentive to offer terms to the new entrant which are comparable to what Axium is currently able to negotiate.

Potential entry or expansion

5.216 The Commission now considers the potential for entry or expansion in the market in relation to:

a) Potential expansion by existing competitors;

b) Potential entry by common-ownership groups;

c) Potential entry by collective buying groups;

d) Potential entry by CMB providers; and

e) Potential entry by a de novo entrant.

Potential expansion by existing competitors

5.217 In this section the Commission considers the possibility of expansion by existing competitors to Uniphar and NaviCorp in the market for buying group services.

IndeGo Plus

5.218 Indepharm launched the IndeGo Plus buying platform for independent pharmacies in 2020, having previously only been available to members of the *totalhealth* symbol group.[562] Based on estimates by Uniphar in its Phase 2 RFI Response, IndeGo Plus had a membership of five retail pharmacies as of 2021, which is less than [0-10]% of the market.

5.219 As to current or future plans to expand or compete more vigorously, the Commission spoke to CommCare, which operates the IndeGo Plus. Speaking of IndeGo Plus, CommCare stated that it:

562 Uniphar Response to Phase 2 RFI, Q25.

"[redacted] Commcare explained that [redacted] The CCPC explained that that update on IndeGo Plus covers the next question however, just to confirm, the CCPC were interested in if Uniphar and Axium were to merge, would Commcare have ambitions in the future to grow and expand IndeGo Plus. [redacted] The idea of IndeGo Plus was a development in response to other buying platforms. [redacted][563]

United Drug

5.220 NaviCorp estimates that Pharmax (which is now owned by United Drug) secured [redacted]% of available retail pharmacies within [redacted] of entering the market in 2016.[564] The Commission notes from Table 4 that Pharmax had a share of [10-20]% of retail pharmacies by 2018. In an email from United Drug to the Commission, responding to queries about the development of Pharmax, United Drug commented that *"it is our understanding that PMLX Limited (Pharmax) was set up by Patrick Meehan, and we believe that he went into partnership with the banner group – Pharmasave Holdings Limited (Total Health)".* In the same email, United Drug noted that *"Pharmax engaged with United Drug to provide supply chain services"* and that *"when enquiries were made to United Drug, we would have positively referred them to Pharmax management."*[565]

[563] CommCare Call Note, p.1, saved as "2022.11.16 Call with Commcare - with Commcare's revisions.pdf".

[564] NaviCorp Response to Phase 2 RFI, Q25(v).

[565] Email from United Drug to the CCPC, 5 September 2022, saved as "2022.09.09 TS to MB RE confidentiality_Redacted".

5.221 The Commission notes, therefore, that Pharmax benefitted on entering the market from a partnership with a symbol group and from its relationship with a full-line wholesaler. At the time, United Drug did not have a compliance-based buying group of its own, and acquired Pharmax in 2019. Currently, every active CMB provider is also active in the market for buying group services.

5.222 As to current or future plans to expand or compete more vigorously, the Parties, in the Written Response stated that *"ownership by the PHOENIX group will* [redacted].[566] Uniphar submitted in its Response to the Phase 2 RFI that *"the PHOENIX group, once its acquisition of United Drug completes, will seek to* [redacted]*"*[567]

5.223 The Commission considers this to be inconsistent with the evidence provided to the Commission by United Drug. In an email from United Drug on 21 November 2022, in response to queries from the Commission, United Drug confirmed that *"[a]t this stage, we are not aware of any planned changes to the service offering".*[568]

Potential entry by common-ownership groups

5.224 The Commission has also considered potential entry from a group of collectively-owned pharmacies which could begin to offer buying group services to independent retail pharmacies in the State and which might have sufficient scale already. Indeed, in its response to the Phase 2 RFI, Uniphar lists several groups of

566 Written Response, paragraph 5.5.

567 Uniphar Response to Phase 2 RFI, Q6.

568 Email from United Drug to the CCPC, 21 November 2022, saved as "2022.12.12 UD to CCPC".

pharmacies as buying groups.[569] *Pure*, Chemco, and *Chemist Warehouse* are examples of such groups.

5.225 The Frontier Report stated that the three barriers to entry identified in paragraph 5.147 above would not be material barriers for common-ownership groups.[570] With respect to the ability to secure discounts, these brands could leverage their existing customer base and existing IT infrastructure.[571] With respect to the range of services provided, these brands already provided these services to their proprietary retail pharmacies.[572] With respect to wholesaler agreements, these brands could use their existing wholesaler agreements.[573]

5.226 The Written Response stated that:

> *"Common ownership groups already provide CMB services to proprietary pharmacies. As such, they would able to compete with commercial buying groups on the full spectrum of services offered."*[574]

5.227 The Frontier Report stated that:

> *"The fact that common ownership groups and buying groups are separate business models is no indication of the likelihood that a common ownership group will start providing buying group services in the face of a hypothetical post-merger price increase. On the contrary, the Assessment itself has noticed how there are numerous examples of recent entry coming from expansion of players previously active in adjacent markets."* [575]

[569] Uniphar Response to Phase 2 RFI, pp 7 to 8.

[570] Frontier Report, paragraphs 71 and 79.

[571] Frontier Report, paragraphs 71, table 3 and 79.

[572] Frontier Report, paragraph 71 and Table 3.

[573] Frontier Report, paragraph 71 and Table 3.

[574] Written Response, paragraph 8.73.

[575] Frontier Report, paragraph 73a.

5.228 Common-ownership groups and buying groups are separate business models and, while common-ownership groups likely have much of the relevant knowledge and many of the capabilities to enter the market for the provision of buying group services, it is important to note that pharmacies within common-ownership groups likely compete directly with the pharmacies they would be providing buying group services to. Common-ownership groups are also able to drive compliance through direct control of each of its pharmacies—this would not be the case were they to provide buying group services to independent retail pharmacies. Furthermore, the Commission has not seen evidence of historical examples of common-ownership groups entering the market for the provision of buying group services.

5.229 The Commission now considers specifically the cases of *Pure*, Chemco and *Chemist Warehouse*, whom the Parties have cited as potential entrants.

Pure

5.230 Uniphar describes *Pure* as *"a common ownership brand".*[576] On a call with the Commission, *Pure* described itself as a group of approximately 20 pharmacies, two of which are franchises. The majority of these pharmacies are under common ownership. *Pure* also confirmed it provides buying services to its pharmacies on a central basis.[577]

5.231 According to Uniphar:

> *"in 2019 the Pure brand diversified from being a brand solely in common ownership to a retail pharmacy brand also offering a franchise solution for independent pharmacists. As part of its recent strategy to recruit more pharmacy members, Uniphar believes that* [redacted]

[576] Uniphar Response to Phase 2 RFI, 'Buying Groups', p. 4.

[577] *Pure* Call Note, p. 1, saved as "2022.06.16 Call Note with CCPC - non-confidential_Redacted".

> [redacted]"[578]

5.232 While, as discussed below, *Pure* does provide CMB services to a small number of independent pharmacies, it does not offer standalone buying group services to independent pharmacies outside of the *Pure* group. When asked about barriers to entry in the buying group sector, *Pure* explained that *"the main barrier is capital requirement, with different requirements in place in the UK."*[579]

Chemco

5.233 Uniphar stated that the Chemco Pharmacy Group was established in 2008 as a common-ownership group and had '[redacted][580]

5.234 The Commission made a number of attempts to contact Chemco to get its views on the market, but was unsuccessful.

Chemist Warehouse

5.235 Uniphar described *Chemist Warehouse* as

> *"an Australian discount franchise chain with over 350 stores in Australia and over 50 stores in New Zealand in addition to a significant B2C E-Commerce business. The model is big box discount: a large store filled with discounted FOS products (beauty products, shampoo); OTC products, both pharmacy-only and general sale) and also offering dispensing of POHPPs. Chemist Warehouse currently has four owned stores in Ireland, in*

[578] Uniphar Response to Phase 2 RFI, 'Buying Groups', p. 8.

[579] *Pure* Call Note, p. 2, saved as "2022.06.16 Call Note with CCPC - non-confidential_Redacted".

[580] Uniphar Response to Phase 2 RFI, Overview of Market Players, p. 5.

Blanchardstown, Henry Street, Ashbourne and Dún Laoghaire with a further new opening in Ballincollig Cork now confirmed. Uniphar believes they [redacted]"[581]

5.236 The Commission made a number of attempts to contact *Chemist Warehouse* to get its views on the market, but was unsuccessful.

Potential entry by collective buying groups

5.237 The Frontier Report stated that the three barriers to entry identified in paragraph 5.147 above would not be material barriers for collective buying groups. With respect to the ability to secure discounts, these groups could leverage their existing customer base, but could need to invest to upgrade their ordering platform.[582] With respect to the range of services provided, these groups would need to invest to provide additional services. With respect to wholesaler agreements, these groups could use their existing wholesaler agreements.[583]

5.238 The Parties specifically identified two entities, Pharma Alliance[584] and ChemCo, which it characterised as collective buying groups.[585] The Commission has

[581] Uniphar Response to Phase 2 RFI, Overview of Market Players, p. 5.

[582] Frontier Report, paragraph 71 and Table 3.

[583] Frontier Report, paragraph 71 and Table 3.

[584] The Parties have used two names to describe this group; Pharma Alliance and Pharmacy Alliance. The Commission uses Pharma Alliance to refer to this group throughout this determination.

[585] Uniphar Response to Phase 2 RFI, Overview of Market Players, p. 5.

considered Chemco in paragraph 5.233 above, and now considers Pharma Alliance.

Pharma Alliance

5.239 Uniphar identified Pharma Alliance as a collective buying group.[586] In a call with the Commission, Pharma Alliance expressed the challenge it would face in offering discounts to retail pharmacies beyond those pharmacies already members of Pharma Alliance, noting that it would be very complicated to scale up their operations to buying group level and that the investment necessary to compete with other buying groups would be considerable.[587]

5.240 Consequently, the Commission does not consider Pharma Alliance to be a buying group, and nor is it a potential entrant into the market for the provision of buying group services in the State.[588]

Potential entry by CMB providers

5.241 The Frontier Report stated that the three barriers to entry identified above would not be material barriers for CMB providers. With respect to the ability to secure discounts, these providers could leverage their existing customer base and IT infrastructure.[589] With respect to the range of services provided, these providers already provided these services to their existing customer base. With respect to wholesaler agreements, these providers could use their existing wholesaler agreements.[590]

[586] Uniphar Response to Phase 2 RFI, "Collective buying groups", p. 5.

[587] Pharma Alliance Call Note, p. 4, saved as "2022.07.29 CCPC Call with Pharma Alliance_Redacted".

[588] See Section 3 for further information.

[589] Frontier Report, paragraph 71 and Table 3.

[590] Frontier Report, paragraph 71 and Table 3.

5.242 The Commission considers the market for CMB services later in Section 5. All of the competitors currently competing actively in that market are currently also active in the market for buying group services.[591]

Potential entry by a de novo entrant

5.243 The Commission has also considered the potential for entry by new competitors, who have been identified by the Parties or by the Commission's own industry research.

[redacted]

5.244 As set out in paragraph 5.145, [redacted] contemplated acquiring NaviCorp, prior to the Proposed Transaction, and entering both the market for the provision of buying group services and the market for the provision of CMB services via that acquisition. [redacted] said *"that it would be unlikely for* [redacted] *to start a buying group from scratch in the pharmaceutical sector, but that did not mean that they would not consider other opportunities in the sector"*.[592]

5.245 The Commission notes that, even if [redacted] were to find an opportunity to enter the market via an acquisition, this would either replace an existing competitor, and/or would require one of the two full-line wholesalers to sell one of their buying groups. The Commission has seen no evidence that the latter prospect is a realistic possibility.

Alitam

5.246 The Parties cite Alitam as an emerging market entrant.[593] The Parties note that Alitam is currently in 'set up phase' and has not begun operating in the State.

591 As noted at paragraph 5.40 above, [redacted]

592 [redacted] Call Note Non-Confidential Summary, dated 10 August 2022, saved as "2022.08.30 [redacted] call note non-confidential summary".

593 Written Response, paragraph 8.159.2.

Uniphar maintains that Alitam is [redacted][594] [redacted][595]

5.247 Alitam describes itself as *"a hugely exciting consolidation of approximately 43 pharmacy groups across the UK and Ireland region."*[596] Furthermore, Alitam notes that these groups *"would represent around 140 pharmacy stores. Prior to consolidation the group is operating as a membership, offering an innovative range of products and services to the member pharmacies."*[597]

5.248 Alitam appears to be pursuing a business model which could see the group acquire interests in and directly own its member pharmacies rather than entering the market for the provision of buying group services.

Commission's conclusions on barriers to entry and expansion in the market for the provision of buying group services in the State

5.249 On the basis of the above, it is the Commission's view that there are significant barriers to entry and expansion in the market for the provision of buying group services in the State, which make it unlikely that a new entrant will enter or an existing competitor will expand in a timely and sufficient manner. In particular, the ability to secure manufacturer-funded discounts is a barrier to entry and expansion in the market for the provision of buying group services in the State. The Commission considers that:

a) On barriers to expansion the Commission considers that once the initial investments have been made by a provider of buying group services, the costs relating to serving additional retail pharmacies may be primarily operating costs, and therefore not a large barrier to expansion. However,

[594] Written Response , paragraph 8.159.2.

[595] NaviCorp Response to Phase 2 RFI, Q35.

[596] For more information, see: https://www.alitamgroup.com/about-alitam-group/.

[597] For more information, see: https://www.alitamgroup.com/about-alitam-group/.

the Commission notes that developing the technology required to be in a strong competitor in the market for the provision of buying group services may be a barrier to entry for a smaller competitor looking to expand.

b) Pharmax, a buying group owned by United Drug, would be one of the two remaining competitors of scale in the market following the Proposed Transaction. Expansion by Pharmax would not ameliorate the SLC concerns identified by the Commission. [redacted]

c) The ability of buying groups to negotiate large discounts depends, in part on being able to offer manufacturers guaranteed levels of volume and compliance, which requires a minimum scale in membership. The Commission considers that potential de novo entrants would struggle to attract members initially before achieving sufficient scale, meaning that even in the event of such entry, it is unlikely to be timely and sufficient. With regard to existing competitors, IndeGo Plus entered in the market in 2020 and only attained a market share of around [0-10]% in approximately two years.

d) The evidence suggests that entry into the market for buying group services has historically been by leveraging a position within the sector, either from existing activities or by acquisition. No potential competitors identified by the Commission have indicated that they are considering entering the market.

e) Contrary to the Parties' stated views, the evidence reviewed by the Commission demonstrates buying groups need to make significant investments in technology to support members achieving compliance.

f) A new buying group would likely need to offer its members services beyond those directly related to discounts, in order to compete with incumbent buying groups which offer a wider range of services. The

Commission also considers that supplying buying group services at scale would entail planning, staffing, set-up costs and business development in order to enter the market.

g) Axium has, and exercises, substantial buyer power in its negotiations with wholesalers. A new entrant to the market would not have, in a timely manner, the degree of buyer power and therefore neither Uniphar nor United Drug may have a strong incentive to offer terms to the new entrant, which are comparable to what NaviCorp is currently able to negotiate.

h) The Commission has considered the potential for expansion by existing competitors and also the potential for entry by CMB providers, common-ownership groups, collective buying groups or de novo entrants, and has found no evidence of plans to enter the market for buying group services.

5.250 The Commission considers that, on the basis of weighing up all of the evidence before it in relation to entry and expansion, it is unlikely that the Commission's competitive concerns will be ameliorated through entry and/or expansion in the market for the provision of buying group services in the State.

Constraints from outside the market

5.251 The Commission assessed the competitive impact of the Proposed Transaction, considering the Parties' arguments on competition from outside the market.

Whether constraints from self-supply could mitigate SLC concerns

5.252 In considering the definition of the Relevant Markets, the Commission concluded that self-supply was not in the market for the provision of buying group services. The Commission now considers the extent to which self-supply in the market for the provision of buying group services could counteract the loss of competition and assuage the SLC concerns that the Commission considers are likely to result from the Proposed Transaction compared with the counterfactual.

5.253 Uniphar said that independent pharmacies had self-supply alternatives to buying groups. They could obtain pricing discounts directly from manufacturers and from short-line wholesalers/parallel importers.[598] In particular, generic manufacturers (e.g., Clonmel, Pinewood and Rowex) which were not the preferred suppliers to buying groups and symbol groups would often offer strong discounts on direct sales to independent pharmacies.[599]

5.254 Uniphar said that LinkUp and LinkUp Gold compete also compete with short-line wholesalers, parallel importers, collective buying groups, and manufacturers negotiating directly with pharmacists and symbol group offerings.[600]

5.255 The Supplementary Economics Report stated:

> *"Each retail pharmacy can be a member of no buying group and instead can to some extent self-supply some of the buying group services by, for example, dealing directly with shortline wholesalers, parallel importers and manufacturers' representatives, one buying group or multiple buying groups."*[601]

5.256 The Supplementary Economics Report stated:

> *"With respect to this latter point, consider for example, Clonmel and Pinewood. These generic manufacturers are the main direct to pharmacy manufacturers and their direct prices to pharmacies are often lower than the buying groups' prices. The buying groups' net price to pharmacies for their recommended generics must be cost competitive with the generic manufacturers' direct to pharmacy price."*[602]

[598] Written Response, paragraph 8.107.

[599] Uniphar Response to Phase 2 RFI, Q2.

[600] Uniphar Response to Phase 2 RFI, Q6.

[601] Supplementary Economics Report, p. 22.

[602] Supplementary Economics Report, p. 25.

5.257 In response to its Phase 1 RFI, NaviCorp stated:

> *"In addition, pharmacies are not required to be a member of a buying group to operate. Indeed, industry reports such as (i) Review of the Sector2018 Irish Pharmacy Union; (ii) Annual Review of Community Pharmacy in Ireland 2020 KPMG-report; and (iii) the three quarterly Fitzgerald Power Pharmacy Pulse reports for 2021 provided with this RFI response do not discuss the importance of buying groups to pharmacies in the context of market trends, important inputs, innovation, costs or indeed at all."*[603]

5.258 In the Written Response, the Parties argued that:

> *"available evidence suggests that independent pharmacies avail of buying group intermediation and self-supply at the same time. For example, published IQVIA156 data shows that Parallel Importers such as PCO, Imed and Lexon currently supply [redacted]% of branded POHPPs (excluding OTC). Similar data from a [redacted] pharmacy shows that [redacted]% of branded POHPPs are currently provided by Parallel Importers. In practice, pharmacies dynamically switch supply between different buying groups (as evidenced by data on multi-homing) and Parallel Importers, to avail of the most convenient purchasing conditions."* [604]

5.259 In the Response to the Commission's Clarification Questions, Uniphar estimates that "[redacted]".[605]

5.260 Furthermore, in the Response to the Commission's Clarification Questions, the Parties noted that:

[603] NaviCorp Response to Phase 1 RFI, Q10.

[604] Written Response, paragraph 8.109.

[605] Response to the Commission's Clarification Questions, Q1(a).

"Over the period 2019 to 2022:

- [redacted] *pharmacies left Axium, and to the best of Navi's knowledge, did not join another buying group (i.e. reverted to self-supplying); and*
- [redacted] *pharmacies closed."*[606]

5.261 In the Written Response, the Parties argued that parallel importers exert a strong competitive constraint, and that *"Parallel Importers would be able to supply up to* [redacted]*% of the portfolio of POHPPs purchased by pharmacies in Uniphar's sample and* [redacted]*% in Navi's sample".*[607]

5.262 The Commission notes, however, that In the Response to the Commission's Clarification Questions, the Parties stated that *"parallel importers' offering of branded POHPPs is opportunistic (depending on availability in other markets) and therefore more ad hoc in nature than generic manufacturers' offering of generic POHPPs".*[608] The Commission considers that parallel imports, the prices of which are exogenous to competitive and pricing conditions in Ireland, are likely to place only a limited constraint on wholesalers and buying groups in Ireland.[609] The Commission also notes that parallel importers sell POHPPs through the various buying groups in the State, as explained in paragraph 2.18 above. Furthermore, it is not clear, and the Parties did not provide any evidence to the effect that, the volumes supplied by parallel importers could increase significantly in response to a price increase in the market for buying group services.

5.263 The Commission considers that self-supply is only a realistic alternative if independent pharmacies can secure similar discounts to those offered by buying

[606] Response to the Commission's Clarification Questions, Q.8.

[607] Written Response, paragraph 8.110. The Parties estimated these using a sample of pharmacies in their Linkup Gold and Axium, respectively. The Commission has not assessed whether these samples are representative of their entire customer base.

[608] Response to the Commission's Clarification Questions, Q.8.

[609] The Commission also observes that pharmacies can buy drugs from parallel importers *via* their buying group (see Written Response, paragraph 5.26), and this is likely to be a far more convenient option than for pharmacies to negotiate directly with parallel importers.

groups, which the Commission has seen no evidence to suggest is the case and which the Commission considers very unlikely. Neither the Written Response nor the Frontier Report address the key issue concerning the strength of this constraint: would the parallel importers/or and manufacturers match the (albeit reduced) discounts offered to individual pharmacies by buying groups in this scenario? The evidence which the Commission has seen has found that pharmacies use buying groups and self-supply in parallel, and has seen little evidence of switching entirely to self-supply, and no evidence of switching in response to price changes.

5.264 Furthermore, a buying group's volumes and compliance are important in its ability to negotiate manufacturer discounts. The Commission does not consider that an independent pharmacy, therefore, is likely to be able to negotiate discounts comparable to a buying group, and has not seen compelling evidence to the contrary.

5.265 Buying groups offer a 'one-stop-shop' for pharmacies, negotiating with a large number of manufacturers on behalf of its members. As noted by GSK:

> *"whilst GSK only have 64 products, buying groups will deal with hundreds if not thousands of medicines in their procurement programme. Therefore, if pharmacies do not want to be a member of Axium if it is legally owned by Uniphar they will likely want to remain a member of another buying group for easier procurement."*[610]

5.266 The Commission is of the view that self-supply is not a significant constraint on providers of buying group services for the following reasons:

a) The closest competitors of buying groups are other buying groups, and Uniphar, NaviCorp and United Drug all compete closely with one another;

[610] GSK Call Note, p. 3, saved as "2022.07.05 Call with GK (002) V2".

b) While independent retail pharmacies can negotiate discounts with manufacturers, they are unlikely to have the volume and compliance necessary to be able to negotiate discounts comparable to those negotiated by buying groups;

c) Negotiating discounts and operating an ordering system can be expensive and time-consuming, and pharmacists in small retail pharmacies are unlikely to have experience in doing this work;

d) The Commission notes that the vast majority of independent retail pharmacies are members of buying groups and that switching predominantly takes place between buying groups, not into and out of the market; and

e) The fact that it is possible to source a supply of drugs without being in a buying group does not mean that an SLC in the market cannot result from a merger.

Competition from providers of CMB services

5.267 In Section 3 (Market Definition) the Commission concluded that the provision of buying group services is a separate market from the provision of CMB services. In assessing competitive effects, the Commission considered the extent to which competition from the provision of CMB services could constrain any post-merger price increases in the provision of buying group services following the implementation of the Proposed Transaction.

5.268 Uniphar said that there was a spectrum of services which retail pharmacists could adopt:

> *"Ultimately, the operating model which a pharmacist elects to adopt (from negotiating and sourcing directly, joining a buying group for pricing only, obtaining additional services from a buying group beyond price or rebranding and joining a symbol group offering) is a commercial call*

motivated by personal appetite to pay fees in exchange for value or services. What is clear is that buying groups and symbol groups offer a combination of discounts and services (to varying levels) and a key differentiator for a pharmacist in making the decision may be whether they wish to rebrand into a common symbol or not. If a pharmacist does not wish to rebrand, then at present its options are to self-supply services, to outsource some services to specific service providers (such as accountants or marketing firms) or to obtain services from a buying group on a 'silent symbol' basis. If a pharmacy is open to rebranding, its options as to who in the market could provide those services are greater."[611]

5.269 Uniphar stated that:

"In response to the evolution in their customer's needs, buying groups will continue to expand and enhance the range of retail support services which they offer. In doing so, the bundles of services which the buying groups provide will edge ever closer to the bundles of services which the symbol groups provide, increasingly blurring the distinction between these two models."[612]

5.270 In the Written Response, the Parties state that:

"the Parties switching data shows that considerable switching occurs between buying and CMB services. For example, Navis's data shows that [redacted]% of pharmacies who left Axium between 2019 and 2022 have joined a symbol group. Most notably over the time period considered, the number of pharmacies which left Axium to join a symbol group is [redacted] than the

[611] Uniphar Response to Phase 2 RFI, Q3.

[612] Uniphar Response to Phase 2 RFI, Q3.

number of pharmacies which joined LinkUp Gold after leaving Axium [redacted]*)".*[613]

5.271 The Commission is of the view that CMB services are not a close constraint on buying groups for the following reasons:

a) On the basis of the evidence and as outlined above in Table 1 and Table 2, CMB services are functionally different to and price differently from buying group services. They are far broader than buying group services, and can encompass store branding and management, and wider services, as well as being able to avail of negotiated discounts on POHPPs (as shown in Table 2). Consequently, CMB services are substantially more expensive than buying group services, coming to at least €[redacted] per month or [redacted]% of annual turnover, depending on the supplier.[614] In addition, branding and re-fitting costs[615] can be €[redacted] - €[redacted][616] The Commission does not consider it realistic that a pharmacy would respond directly to an increase in price from a buying group by moving to a more expensive and onerous CMB proposition.

b) All providers in the market for CMB services are already active in the market for buying group services, with the exception of Pure which has a *de minimis* share in the market for CMB services. The Commission therefore does not consider that the providers in the market for CMB services can exert a competitive constraint *additional* to the competitive constraints within the market for buying group services. The Commission also considers that the Proposed Transaction will lead to an SLC in the market for CMB services, as set out later in this section.

[613] Written Response, paragraph 8.116.

[614] See paragraph 2.69.

[615] While financial support in the form of loans may be available from the CMB provider, the Commission understands that ultimately the pharmacy bears the cost of branding and re-fitting.

[616] Uniphar Response to Phase 1 RFI, Q40(i).

Indirect constraints

5.272 The Economics Report stated that competition between buying groups would be supplemented by competition from downstream retail pharmacy chains:

> *"However, it is not at all clear to this author at least, to what extent these two proposed product markets [CMB and Buying Groups] represent meaningful competition policy (as opposed to commercially meaningful) markets. In particular, even if the supply of such services were controlled by a hypothetical monopolist it seems clear that this monopolist would face a significant level of competition from the (vertically integrated) retail pharmacy chains such as Boots, McCauley's, McCabes as well as many others.*[617]

5.273 And:

> *"In addition, and as previously indicated, it seems clear that the symbol/franchise retail pharmacies as well as the buyer groups face a significant level of competition from (vertically integrated) retail pharmacy chains such as Boots, McCauley's, McCabes as well as many others, who in essence already supply themselves with common management/branding services and buyer group services."*[618]

5.274 The Economics Report stated:

> *"manufacturers would be less likely to provide discounts to a buying group if they became aware (e.g. through their sales decreasing) that these discounts were not being passed on to the members of the buying group to the same extent as before: indeed, this point would limit to at least*

[617] Economics Report, p. 10, Annex 7.3(a) to the Merger Notification Form. See also, p. 19.

[618] Economics Report, p. 18, Annex 7.3(a) to the Merger Notification Form.

some extent the buying group's technical/commercial ability to reduce the pass through of discount in the first place."[619]

5.275 The Commission's view is that this argument regarding the constraints on buying groups relies on manufacturers having concerns that higher prices charged by buying groups will result in lower volumes of POHPPs being sold by retail pharmacists. Consequently, the Commission considers that this should be considered as an indirect constraint.

5.276 The Commission notes, while downstream competition can, in principle, exert a competitive constraint on upstream businesses, a distinction can be made between direct and indirect constraints when assessing competitive constraints.

- Direct constraints derive from the ability of the immediate customer to switch to an alternative. For example, for illustrative purposes, consider a tyre manufacturer selling tyres to car manufacturers. Here the direct customer is the car manufacturer and if a supplier like Goodyear were to increase its prices the direct constraint would come from a customer like Ford switching to an alternative supplier like Pirelli.

- Indirect constraints come from further downstream. For example, the tyres supplied by Goodyear are part of the cost of making cars. If the price of Goodyear tyres increases, then this will increase the price of cars fitted with Goodyear tyres. The downstream constraint would come from consumers switching away from cars with Goodyear tyres because the car price has increased.[620]

5.277 The strength of downstream constraints on upstream competition is influenced by two factors:

[619] Supplementary Economics Report, p. 25.

[620] In the European Commission case *AT.40099 Google Android* the Commission assessed the indirect constraints on Google's Android operating system resulting from the possible the competition between iOS/Blackberry devices and Google Android devices both at the level of users of smart mobile devices and of app developers.

- Is the upstream product a large proportion of the marginal downstream costs? If the upstream product is a small proportion of marginal downstream costs, then indirect constraints will be weaker. For example, tyres are an input into the making of cars. However, an increase in the price of tyres is likely to have a minimal impact on the retail price of cars.

- Is there intense price competition between downstream suppliers? If downstream customers are very responsive to price increases and switch volumes readily, then indirect constraints will be stronger. For example, if car buyers are extremely price sensitive and would switch in response to small price changes, then any increase in tyre prices, and the consequent impact on the retail price of cars, could lead to substantial switching.

5.278 The Commission has considered these two factors in the context of the provision of buying group services, and the supply of prescription POHPPs in retail pharmacies to consumers in local areas.

Proportion of costs

5.279 Identifying the exact proportion of retail pharmacists' costs that can be associated with purchasing buying group services is not straightforward and therefore the Commission has adopted three complementary approaches to assess this factor.

5.280 First, the monthly fee for Axium is €[redacted] per month, or €[redacted] per year and NaviCorp said '[redacted].'[621] Research by KPMG estimated the average annual retail pharmacy costs as €1,455,000,[622] so the €[redacted] for buying group services would be less than [redacted]% of costs.

[621] NaviCorp Response to Phase 2 RFI, Q6(i).

[622] IPU (2021). *Annual Review of Community Pharmacy in Ireland 2020,* p. 28.

5.281 Second, in 2020, NaviCorp's revenue from the provision of buying group services through Axium was €[redacted][623] In December 2020 Axium had [redacted] members,[624] giving a per member revenue of €[redacted] Assuming that this figure represents the costs incurred by each pharmacy to remunerate Axium for the buying group services provided by Axium, this figure would represent around [redacted]% of the costs of the average pharmacy.

5.282 Third, the Commission has considered how a change in the discount retail pharmacies receive on the POHPPs they purchase would affect retail pharmacies' costs. As discussed above, retail pharmacies receive a wholesaler discount of [redacted]%. A change of [redacted]% in that discount would constitute a reduction of around [redacted] Since the purchase of POHPPs represents less than [redacted]% of the costs of running a retail pharmacy, this change would be less than [redacted]% of the costs of the costs of running a retail pharmacy.

5.283 Consequently, the evidence shows that the costs of buying group services represents a small proportion of retail pharmacists' costs and this is likely to weaken considerably the impact of any indirect constraints.

5.284 In the Written Response, the Parties argued that *"we note that the proportion of costs is only one part of this equation. What is important to consider is the impact that a change in those costs could have in relation to the retailers' margins, as a small change in costs can have a big impact on retailers' margins."*[625] However, the Parties have not provided any evidence to suggest that there would be a large impact on retailers' margins.

Price competition between downstream pharmacies

[623] NaviCorp Response to Phase 2 RFI, Q51, Table 10.

[624] NaviCorp Response to Phase 2 RFI, Q51, Table 10.

[625] Written Response, paragraph 8.121.

5.285 The topic of downstream price competition was discussed in the Supplementary Economics Report:

> *"Imagine that all retail pharmacies received a ten per cent reduction in the prices of all prescription products. While it would be possible to pass on some or all these price reductions directly to their private patients (as these private patients pay the retail pharmacies), it would not be possible to pass on these price reductions directly to their public patients (as public patients do not pay the retail pharmacies) unless of course one allows for the retail pharmacies to pay money to public patients (i.e. charge negative prices for prescription products, which the author believes would be illegal). Of course, it is to be hoped from a competition policy perspective that the retail pharmacies would – probably over time - pass these price reductions onto all their customers by providing an improved service and/or perhaps lower prices on other products. Indeed, competition at the retail pharmacy level would encourage/incentivise just such an approach.*
>
> *In summary, one would expect little short-term direct pass on (as it would be impossible/illegal) but complete long-term indirect pass on."*[626]

5.286 The Supplementary Economics Report also said the following on indirect constraints:

> *"However, and as indicated previously, for prescription products that are sold to public patients, there is an obvious limit to this passing on of price increases, namely, the reimbursement prices negotiated, and paid, by the state. As such, there could be no passing on in price to the final consumers.*
>
> *More generally, in the context of this possible passing on of price increases, it is important to realise that the buying group services that are provided by buying groups (such as Uniphar's buying groups) are also*

[626] Supplementary Economics Report, p. 14.

provided internally by retail groups, especially the larger ones such as Boots and Tesco, and that Uniphar would have to be mindful of the impact of their higher prices (or lower discounts) on downstream competition between their members and, say, Boots and Tesco. This provides an important motivation for Uniphar not to increase their buying group prices."[627]

5.287 Uniphar said that the State reimburses pharmacies for approximately 80% of retail sales of prescription POHPPs, including patented and generic, effectively setting the retail price for those prescription POHPPs. This means that pharmacies do not set the retail price in respect of these sales and do not compete on retail price in respect of these sales (though they do compete on other parameters, such as service).[628]

5.288 For the remaining 20% of private dispensing retailer prices, Uniphar said that pharmacies in general pass on most if not all of manufacturer-funded discounts in their retail pricing as all pharmacies face strong price competition from other pharmacies.[629] In Uniphar's experience, the competitive constraint at the retail pharmacy level is intense and causes retail pharmacies to pass through wholesale price reductions promptly.[630]

5.289 NaviCorp said that it is solely at the pharmacy's discretion whether to pass-through a change in the manufacturer discount secured by Axium to the pharmacists' customers/patients. NaviCorp said that it does not have visibility of *CarePlus* and *StayWell* pricing, so is not in a position to evidence the extent to

[627] Supplementary Economics Report, p. 25.

[628] Uniphar Response to Phase 1 RFI, Q23 and Q24.

[629] Uniphar Response to Phase 1 RFI, Q23 and Q24.

[630] Uniphar Response to Phase 1 RFI , Q24.

which pharmacies pass-through the manufacturer-funded discount pass-through rate.[631]

5.290 The evidence above shows that most customers do not pay for their prescription. Consequently, they are unlikely to be price sensitive when choosing their pharmacy.

5.291 Furthermore, internal documents from Uniphar showed that *"Prescription and Medicine pricing"* was not one of the five most important factors when choosing a retail pharmacy. More important were location, past experience, friendliness of staff, relationship with pharmacist, and parking available.[632]

5.292 Consistent with this, the IPU said that the following were the key drivers of competition between retail pharmacies:

> *"In the IPU's view, the key drivers are location, location in relation to the prescriber, the range of products and services offered, opening hours, quality of service and price for private patients."*[633]

5.293 The Commission notes, however, that the First Pharmacy Questionnaire did provide some evidence on this issue. 13 pharmacies responded to the question *"Do the discounts you secure through being a member of a pharmacy buying group impact the retail prices you charge your customers? If so, does this vary depending on whether the customer is a public or private customer?"* .The responses to the questions suggested that for the majority lower purchasing prices would result in lower prices charged to final private consumers. Other retail pharmacies reported passing on some of the discount.[634] The Commission's Second Pharmacy Questionnaire also asked pharmacies whether they would pass on discounts to

[631] NaviCorp Response to Phase 2 RFI, Q21.

[632] Uniphar document "SFRETAILHIGHLIGHTSC21-307 Pharmacy Brand Equity & Market Study 2021 Report Full Report V2", dated November 2021, slide 17.

[633] IPU Response to Information Request RFI, Q27.

[634] For example, Pharmacy 24, Response to the Commission's second questionnaire, saved as "Call with Pharmacy 24_Redacted.pdf".

the customers. A majority of pharmacies responded that at least a proportion of any discount would be passed on to consumers. The small sample sizes, however, means that it is unclear whether these results are representative of the views of retail pharmacies more generally and therefore the Commission does not place undue weight on these results. The evidence as a whole shows that the majority of retail customers are unlikely to be price sensitive to the cost of POHPPs and this is likely to weaken considerably the impact of any indirect constraints.

5.294 In the Written Response, the Parties stated that:

> *"no conclusion is reached with regard to the intensity of price competition between retail pharmacies on non-price regulated goods and services. In particular, we note that market evidence shows that the Irish pharmacy retail market is very competitive, exhibiting low concentration, high retail penetration and low barriers to entry, as found in previous Commission decisions".*[635]

5.295 The Commission considers that, while the Irish pharmacy retail market may be highly competitive, it is not clear that there would be significant customer diversions to competitor pharmacies in response to a 5-10% increase in prices, and furthermore it is highly unlikely that an SLC in the market for buying group services would lead to this level of price increase at the retail pharmacy level, as set out in paragraphs 5.281-5.282.

Impact on wholesaler volumes

5.296 In respect to how changes by Uniphar to buying group prices could impact on wholesale volumes, arguments in this regard were summarised in the Supplementary Economics Report as follows:

> *"In summary, it seems clear that Uniphar would not have the ability and/or incentive to increase the prices of the buying group services (e.g.*

[635] Written Response, paragraph 8.122.

membership fees or reduced pass through of discounts from manufacturers) that they provide to their buying group members (i.e. retailers) significantly as a result of the proposed acquisition. Any significant attempt by the buying group to raise prices to the retail pharmacy members post the proposed acquisition would result in Uniphar/Axium losing members and throughput/volume. [redacted]"[636]

5.297 In the Written Response, the Parties submit that "[redacted]*% of Uniphar's gross margins from LinkUp Gold pharmacies result from its full-line wholesale activity*"[637] and that [redacted]"[638]

5.298 The Commission notes that the Parties' argument relies on an increase in the price of buying group services (or a reduction in the discount passed on) leading to independent pharmacies switching away from that buying group and possible switching wholesaler to United Drug. The Commission does not consider this argument persuasive, for the following reasons:

a) As set out in paragraph 2.281, buying group services represent a small proportion of pharmacies costs.

[636] Supplementary Economics Report, p. 27.

[637] Written Response, paragraph 8.125. The Frontier Report, from which this analysis is taken, cited [redacted]% of *net* margins, rather than *gross* margins.

[638] Written Response, paragraph 8.125.

b) The Commission set out earlier that it is concerned that competitors—either the merged entity or the remaining third party competitors in the market—may not have a strong incentive to replace this competitive constraint following the implementation of the Proposed Transaction. The Commission also notes paragraph 4.11 of the Merger Guidelines which Written Response *"competitors [may] not have a strong incentive to compete (for example, if they might also benefit from increased prices), also referred to as price accommodation".* Such price accommodation would mean the competition from United Drug which the Parties are citing, may not sufficiently constrain the merged entity Post Transaction in the manner the Parties are proposing.

Overall conclusion for horizontal unilateral effects in the market for the provision of buying group services

5.299 The Commission has considered a number of factors in assessing the theory of harm that the loss of a close competitor in a highly concentrated market for the provision of buying group services will likely result in an increase in prices (or a reduction in discounts), a loss in service quality, and/or a loss of innovation to customers. These include the high levels of concentration in the market for the provision of buying group services; the ability of customers to switch buying groups; the closeness of competition between the Parties; barriers to entry and expansion in the market; and constraints from outside the markets. The Commission considers that:

a) The effect of the implementation of the Proposed Transaction would be to reduce the number of suppliers of buying group services from 4 to 3, with one of the remaining competitors having a very small market share [redacted] The Commission has found that the market for the provision of buying group services is already highly concentrated, and that on the basis of the evidence available to the Commission, the effect of the Proposed Transaction would be to substantially increase concentration. Following implementation of the Proposed Transaction, Uniphar would have the largest share using either a trade value of purchases measure or a membership numbers measure ([70-80]% and [50-60]%, respectively, on the basis of 2021 market shares). The market structure would be one where the leading two undertakings (Uniphar and United Drug), would collectively have almost the entire market, with the only other remaining competitor [redacted] having [0-10]% or less than [0-10]% market share, under the two respective market share measures.

b) Internal Uniphar documents (as set out in paragraphs 5.46 to 5.53) suggest that the rationale for the Proposed Transaction includes [redacted] a new competitor acquiring scale in the market and eliminating the competition between Uniphar and United Drug for Axium's customer base. Increased competition for the Axium wholesale volume, from e.g., the Phoenix group, for NaviCorp and its customers is *prima facie* good for the market and good for consumers. The role of the Commission is to ensure that the Proposed Transaction does not result in an SLC in the Relevant Markets.

c) There is evidence of switching between buying groups, in particular between Pharmax, Axium and LinkUp Gold. The majority of members who leave one of these three buying groups join one of the others. Following the completion of the Proposed Transaction, customers of the Parties would have few alternative suppliers to switch to. The removal of Axium would remove one of the three biggest buying groups from the market.

d) Uniphar, NaviCorp and United Drug all complete closely in the market, and therefore the likely effect of the implementation of the Proposed Transaction will be to remove a close competitor to Uniphar.

e) Axium has historically been a strong competitor and innovator in the market. While Axium's ability to innovate would not necessarily be lost as a consequence of the Proposed Transaction, the Commission is concerned that competitors—either the merged entity or the remaining third party competitors in the market—would not be likely to have a strong incentive to replace this competitive constraint following the implementation of the Proposed Transaction.

f) The Commission considers that Axium is able to exercise a considerable amount of buyer power which it uses to differentiate itself from others in the buying group market and deliver increased discounts. Axium is a large buying group ([50-60]% of trade value of purchases and [20-30]% of members of the market for the provision of buying group services), and has switched suppliers from United Drug to Uniphar in the past. Therefore, the Commission considers that Axium has substantial buyer power and exercises it to the benefit of retail pharmacies. This buyer power is not replicated by competitors in the market which are either vertically integrated or have a very small presence in the market (IndeGo Plus).

g) In terms of expansion, Pharmax, a buying group owned by United Drug, would be one of the two remaining competitors of scale in the market following the Proposed Transaction. Expansion by Pharmax would not ameliorate the SLC concerns identified by the Commission. IndeGo Plus [redacted] the Commission notes that developing the technology required to be in a strong competitor in the market for the provision of buying group services may be a barrier to entry for a smaller competitor looking to expand.

[639] CommCare Call Note, p. 1, saved as "2022.11.16 Call with Commcare - with Commcare's revisions.pdf.

h) The ability of buying groups to negotiate large discounts depends, in part on being able to offer manufacturers guaranteed levels of volume and compliance, which requires a minimum scale in membership. The Commission considers that potential de novo entrants would struggle to attract members initially before achieving sufficient scale, meaning that even in the event of such entry, it is unlikely to be timely and sufficient. Furthermore, the evidence reviewed by the Commission demonstrates buying groups need to make significant investments in technology to support members achieving compliance.

i) The Proposed Transaction may increase the ability and incentives of other suppliers active in the market for the provision of buying group services in the State to raise prices, reduce discounts passed onto pharmacies, and/or degrade service quality on their own initiative.

5.300 Taking all this into account, the Commission has concluded that the Proposed Transaction is likely to result in an SLC in the market for the provision of buying group services in the State compared to the counterfactual.

5.301 The Commission discusses whether the efficiencies arguments and proposals submitted by the Parties ameliorate the SLC in this market in Sections 8 and 9, respectively.

Theory of harm 2 – The loss of a close competitor in a highly concentrated market for the provision of CMB services will likely result in an increase in prices, a loss in service quality, and/or a loss of innovation to retail pharmacies in the State.

5.302 The implementation of the Proposed Transaction would result in NaviCorp's CMB services, which trade under the *CarePlus* and *StayWell* brands, transferring to Uniphar, resulting in an increase in concentration compared to the counterfactual. The theory of harm is that the merger would likely reduce the competitive pressure on providers of CMB services, due to the loss of a competitor in the market. This, in turn, would likely lead to higher prices, lower service quality, and/or reduced innovation to retail pharmacy customers in the State.

5.303 In considering the extent to which the Proposed Transaction is likely to raise horizontal unilateral effects concerns, the Commission sets out below:

a) Views of the Parties;

b) Impact of the Proposed Transaction on market structure and concentration;

c) Assessment of horizontal unilateral effects; and,

d) Conclusion in respect of horizontal unilateral effects in the market for the provision of CMB services in the State.

Views of the Parties

5.304 The Parties submitted that the Proposed Transaction would not result in an SLC.[640]

5.305 In the Merger Notification Form the Parties submitted *"rough estimates"* of market share data[641] for CMB Services in the State, as shown in Table 9 below.

Table 9 – Providers of CMB Services in the State.

Name	Share
Comm Care Pharma (Haven + totalhealth)	[30-40]%
CarePlus (Navi)	[20-30]%
StayWell (Navi)	[0-10]%
Pure	[0-10]%

[640] Merger Notification Form, section 5.3.

[641] The Parties did not specify the methodology or unit of measurement used to calculate market shares.

Uniphar	[30-40]%
Market Total	100%

Source: Source: Commission analysis of information provided by the Parties[642]

5.306 The Parties put forward a number of arguments as to why, even with a combined market share of [60-70]% post-transaction, there would not be an SLC in the market for the provision of CMB services. In the Frontier Report, the Parties arguments as to why there would not be an SLC were summarised as follows:

> *"First, the Assessment has taken an overly narrow approach to defining the market by only considering CMB providers, as competition for management and branding services takes place between business models (e.g. between self-supply and CMB services), not just within business models. In fact, the evidence in the Assessment shows that the majority of switching takes place between business models rather than within business models. A market definition where more switching takes place to firms outside the market than within the market does not make sense and so undermines the premise of this Theory of Harm.*
>
> *b) Second, even taking the Assessment's more narrow approach to CMB services, the merger would be a "6-to-5"2 situation. There is therefore plenty of choice available for customers within even this narrowly defined market.*
>
> *c) Third, there are no meaningful barriers to expansion for these existing competitors. Therefore, existing competition within CMB services would be sufficient, in itself, to constrain Uniphar post-transaction. The Assessment has not articulated why these competitors would not expand in response to any potential post-merger price increase.*

[642] Merger Notification Form, Annex 5.2.

d) Fourth, barriers to entry are low – as evidenced by significant entry over time – and there are numerous existing common ownership brands that could readily expand into CMB services. The Assessment overstates the barriers to entry by only considering the costs that would be faced by a de novo entrant rather than an entrant from closely related services, such as common ownership pharmacies.

e) Fifth, the Assessment has not considered countervailing power, but the evidence shows that pharmacies will have significant countervailing power given their commercial significance, ability to divert purchases, ability to switch suppliers and ability to self-supply, for the same reasons as for Theory of Harm 1. There will also be a magnified effect on Uniphar's profits from any switching away of CMB services due to the additional impact on its full line wholesaling profits."[643]

5.307 The Commission has already addressed the Parties' points on market definition earlier in the Determination, and assesses the Parties' views in the round below in the assessment of horizontal unilateral effects.

The impact of the Proposed Transaction on market structure and concentration

Market structure

5.308 Paragraph 3.1 of the Commission's Merger Guidelines states that *"[a] central element in assessing the competitive impact of a merger is identifying its effect on market structure."* Market structure can be characterised by the number, size and distribution of firms in a market. A merger or acquisition will have an impact on market structure as the merging parties which were two firms pre-acquisition become one firm post-acquisition. In the case of the Proposed Transaction, the impact on the market structure is the removal of a close and significant competitor in NaviCorp and the transfer of its market share to Uniphar.

[643] Frontier Report, paragraph 6.

5.309 The Commission considered two ways in which the structure of the market may be observed. These are:

a) Total turnover of each CMB provider; and

b) The number of pharmacies that purchase CMB services from each CMB provider.

Total turnover of each CMB provider

5.310 In relation to the total turnover of each CMB provider, the Commission considered that a number of issues existed with the quality and consistency of the data that made it inappropriate for use in this Determination. These issues are:

- In its Phase 2 RFI Response, Uniphar provided turnover data for the CMB pharmacies themselves, and not just Uniphar's revenue accrued from CMB membership; and,

- Neither Party was able to provide robust turnover data for third party competitors, and data provided by third party competitors was not consistent.

5.311 Furthermore, NaviCorp stated, in its Phase 2 RFI Response:

"[I]t is important to note the following limitations:

(a) First, some entities are part of a wider group, and, as such, published financial statements do not provide a breakdown of turnover relating to the provision of common management and branding services.

(b) Second, where data is available, it is not a reliable measure of market presence as some operators may not seek to earn a revenue from the provision of common management and branding services. For example, a symbol/franchise group that operates on a cooperative model may not

record revenue allocated to the provision of common management and branding services.

(c) Likewise, a symbol/franchise group which is vertically integrated with a wholesaler where a key purpose of the group may be to secure volume for the wholesale arm, rather than as a standalone revenue generator and therefore it may not seek to earn a revenue from the provision of common management and branding services.

(d) In this regard, Navi notes that the Life Pharmacy website states that "100% of the paid membership fees [are] spend on supplying services to the members".

In light of the above mentioned limitations, Navi does not consider that turnover information is an accurate proxy for market significance."[644]

5.312 At a meeting with the CCPC on 24 June 2022, the Parties suggested that the trade value of sales would be an alternative way of measuring market shares. They also noted that doors do not necessarily correlate to sales.[645]

5.313 For all of these reasons, the Commission agrees with the Parties that turnover of CMB provider is not a reliable measure for determining market shares

<u>The number of pharmacies that purchase CMB services from each CMB provider</u>

5.314 The Commission considers that CMB membership numbers are a close proxy for competitors' shares in this market. Therefore, to estimate market shares and market concentration in the market for the provision of CMB services in the State, the Commission has used CMB membership numbers.

[644] NaviCorp Response to Phase 2 RFI, Q5(i).

[645] CCPC RFI Scoping Letter to the Parties, dated 24 June, p. 2.

5.315 Table 10 below sets out the Parties' estimates of market shares[646] based on the number of pharmacies that purchase CMB services from each CMB provider in the State, from 2018 to 2021.

Table 10: Market shares in the CMB market, membership numbers.

Owner	Uniphar		NaviCorp		CommCare		Pure
CMB Group	**Allcare**	**Life Pharmacy**	**CarePlus**	**StayWell**	**Haven**	**totalhealth**	**Pure**
2018	[10-20]% [redacted]	[20-30]% [redacted]	[10-20]% [redacted]	[0-10]% [redacted]	[10-20]% [redacted]	[20-30]% [redacted]	-
2019[647]	[10-20]% [redacted]	[20-30]% [redacted]	[10-20]% [redacted]	[0-10]% [redacted]	[10-20]% [redacted]	[20-30]% [redacted]	[0-10]% [redacted]
2020[648]	[10-20]% [redacted]	[20-30]% [redacted]	[10-20]% [redacted]	[0-10]% [redacted]	[10-20]% [redacted]	[20-30]% [redacted]	[0-10]% [redacted]
2021	[10-20]% [redacted]	[20-30]% [redacted]	[10-20]% [redacted]	[0-10]% [redacted]	[10-20]% [redacted]	[20-30]% [redacted]	[0-10]% [redacted]

Source: The Parties.[649]

5.316 These market share figures show that in 2021 the Uniphar-owned CMB groups, *Allcare* and *Life Pharmacy*, together had a total of [40-50]% of the CMB group members in the State. NaviCorp's CMB groups, *CarePlus* and *StayWell*, made up [20-30]% of the CMB group members in the State in 2021. CommCare's CMB groups, *Haven* and *totalhealth* made up [30-40]%. The remainder of the CMB market was made up of the *Pure* pharmacies which are not part of *Pure*'s common-ownership group.

[646] The Parties also included estimates for Lloyds Pharmacies and *McCabes*. Lloyds (which currently has two franchisees) was described as "dormant" in United Drug Response to Information Request, Q17. *McCabes* currently offers CMB services to two pharmacies [redacted] Given the minimal number of franchisees and the lack of plans to expand, neither has been included in the analysis of market shares. Even if Lloyds and/or *McCabes* were to be included, this would have minimal impact on the Commission's conclusions on market structure and concentration.

[647] The market shares calculated for 2019 add up to 99% due to rounding.

[648] The market shares calculated for 2020 add up to 101% due to rounding.

[649] *Allcare*, *Life Pharmacy* figures provided by Uniphar in its Response to the Phase 2 RFI, *CarePlus* and *StayWell* figures provided by NaviCorp in its Response to the Phase 2 RFI. *Haven*, *totalhealth*, and *Pure* figures were estimated by Uniphar in its Response to the Phase 2 RFI, based on market knowledge.

5.317 The Commission notes that the market shares of CMB providers have remained fairly static over the period from 2018 to 2021, implying that the shares of net new additions is broadly aligned with market shares.

<u>The likely effect of the Proposed Transaction on the market structure</u>

5.318 The Commission now sets out the likely effect of the Proposed Transaction on the structure of the market for the provision of CMB services in the State.

5.319 The Commission has taken, as a starting point, the shares of membership numbers as of 2021 set out in Table 10 above. Table 11 sets out the pre and post Proposed Transaction market shares, based on 2021 membership numbers.

Table 11: Market shares in the market for the provision of CMB services, membership numbers

Owner	Uniphar	NaviCorp	CommCare	Pure
Pre-Proposed Transaction	[40-50]% [redacted]	[20-30]% [redacted]	[30-40]% [redacted]	[0-10]% [redacted]
Post Proposed Transaction	**[60-70]%** [redacted]		[30-40]% [redacted]	[0-10]% [redacted]

Source: The Commission's analysis of evidence provided by the Parties and third parties.

5.320 As can be seen in Table 11, following implementation of the Proposed Transaction, Uniphar would hold the largest share in the market ([60-70]%), by a substantial margin over CommCare. Between them, Uniphar and CommCare would have close to the entire market, with *Pure* currently only having a very small share.

5.321 The Commission now sets out its views on the effects of the Proposed Transaction on market concentration.

Market concentration

5.322 Market concentration refers to the degree to which production or supply in a particular market is concentrated in the hands of a few large firms. The Commission's Merger Guidelines state, at paragraphs 3.2 to 3.4, the following:

"Market concentration provides a snapshot of market structure and is often a useful indicator of the likely competitive impact of a merger. It is of particular relevance to the assessment of horizontal mergers. A horizontal merger that has little impact on the level of concentration in the market under consideration is unlikely to lead to an SLC.

Market concentration, however, is not determinative in itself. A high level of market concentration post-merger is not sufficient, in and of itself, to conclude that a merger is likely to lead to an SLC. Other relevant factors (such as, for example, the closeness of competition between the merging parties, market dynamics, barriers to entry and expansion, etc.) will be examined by the Commission before any conclusion is reached concerning the likely competitive impact of a merger.

Market shares are important when measuring concentration. The market shares of firms in the market can give an indication of the extent of a firm's market power. The combined market share of the merging parties, when compared with their respective market shares pre-merger, can provide an indication of the change in market power resulting from the merger. Competition concerns are more likely to arise when the merger creates a merged entity with a large market share."

5.323 Paragraphs 3.9 to 3.10 of the Commission's Merger Guidelines set out that the Commission utilises the Herfindahl-Hirschman Index (*"HHI"*) as a measure of market concentration. The Commission's Merger Guidelines state that the Commission will have regard to the following HHI thresholds:

"A post-merger HHI below 1,000 is unlikely to cause concern.

Any market with a post-merger HHI greater than 1,000 may be regarded as concentrated and highly concentrated if greater than 2,000.

Except as noted below, in a concentrated market a delta of less than 250 is unlikely to cause concern and in a highly concentrated market a delta of less than 150 is unlikely to cause concern."

5.324 The Commission's Merger Guidelines explain, at paragraph 3.11 that:

"the purpose of the HHI thresholds is not to provide a rigid screen in order to determine whether or not a merger is likely to result in an SLC. Rather, the HHI is a screening device for deciding whether the Commission should intensify its analysis of the competitive impact of a merger."

5.325 Based on the market share estimates set out in Table 10 above, there is high concentration in the market for the provision of CMB services in the State. Table 12 below illustrates that the HHI in the market for the provision of CMB services in the State following implementation of the Proposed Transaction would be 5,214 on the basis of membership numbers. Furthermore, the change in the HHI would be 1,760, which, as set out in paragraph 3.10 of the Commission's Merger Guidelines, means that an intensified analysis of the competitive impact of the Proposed Transaction is required.

Table 12: The HHI in the market for the provision of CMB services in the State, 2021

	HHI (membership numbers)
Pre-Proposed Transaction	3,454
Post-Proposed Transaction	5,214
HHI delta	1,760

Source: The Commission

Conclusions on market structure and market concentration

5.326 The Commission is of the view that market shares contribute to an understanding of the existing structure of the market for the provision of CMB services and the market dynamics in the State. The Commission's investigation revealed that, following the implementation of the Proposed Transaction, Uniphar would have the largest share using membership numbers ([60-70]%). Following implementation of the Proposed Transaction, the market structure would be one where the leading two undertakings (Uniphar and CommCare), will collectively have almost the entire market, with the only other remaining competitor having a [0-10]% market share.

5.327 The Commission had regard to the EC Horizontal Merger Guidelines regarding the relationship between high market shares and market power which states that:

> *"The larger the market share, the more likely a firm is to possess market power. And the larger the addition of market share, the more likely it is that a merger will lead to a significant increase in market power. The larger the increase in the sales base on which to enjoy higher margins after a price increase, the more likely it is that the merging firms will find such a price increase profitable despite the accompanying reduction in output. Although market shares and additions of market shares only provide first indications of market power and increases in market power, they are normally important factors in the assessment".* [650]

5.328 The Commission's conclusion is that these market shares indicate a significant increase in market power as a result of the Proposed Transaction when compared with the counterfactual. The Commission is also of the view that these large increases in market shares could make price increases profitable despite a potential loss of some customers.

5.329 On the basis of the HHI calculations set out in Table 12 above, and consistent with the Commission's Merger Guidelines, the market for the provision of CMB services is already highly concentrated. The Commission notes that implementation of the Proposed Transaction is likely to result in the market for the provision of CMB

[650] Merger Guidelines, paragraph 27.

services in the State becoming more concentrated when compared to the counterfactual. In line with the Merger Guidelines,[651] the high level of concentration indicates that the Commission should intensify its analysis of the competitive effects of the Proposed Transaction in the market for the provision of CMB services in the State.

Consideration of the rationale for the Proposed Transaction

5.330 The Commission refers to the discussion set out in paragraphs 5.46 to 5.56 above relating to Uniphar's rationale for pursuing the Proposed Transaction. In both of the documents referenced, Uniphar noted that NaviCorp was a '[redacted]'.[652] It appears to be clear, then, that part of Uniphar's rationale for the Proposed Transaction is to reduce competition against Uniphar's CMB services by removing NaviCorp from the market.

Assessment of Horizontal Unilateral Effects in the market for the provision of CMB Services

5.331 Even prior to the Proposed Transaction, the market for the provision of CMB services in the State is highly concentrated. Following implementation of the Proposed Transaction, the market will become substantially more concentrated. Indeed, the level of Post-Merger HHI is more than twice the level at which a market is deemed to be highly concentrated and the increase in HHI is more than 10 times the threshold for a highly concentrated market.

5.332 Higher levels of concentration are generally associated with less competition. The Commission is concerned that this reduction in competition could potentially lead to a combination of higher prices, reduced service quality or lower innovation, to the detriment of retail pharmacies who are current or potential customers of CMB providers. In the analysis below, the Commission considers whether the

[651] Merger Guidelines, paragraphs 3.9-3.12.

[652] Uniphar document "*MA and IR_Jan 2021 Board_v2.pdf.PDF*", dated 26 January 2021, Uniphar Response to Phase 1 RFI. The Commission understand that ICP refers to independent community pharmacy.

presumption of higher levels of concentration implying less intense competition is valid in this case.

5.333 The potential responses of other providers in the market, and any constraints outside the markets, are also relevant in evaluating Uniphar's pricing incentives following implementation of the Proposed Transaction. The Commission's Merger Guidelines note the following relevant factors which are relevant to determine whether an SLC is unlikely to occur despite the high levels of concentration in the market and the increase in concentration that likely will occur following the implementation of the Proposed Transaction:

> *"Competitive constraints on a merged entity will be weaker to the extent that (i) there is an absence of substantial competition from other firms in the market or firms likely to enter in a timely manner, (ii) competitors have insufficient productive capacity to increase output, or (iii) competitors do not have a strong incentive to compete (for example, if they might also benefit from increased prices), also referred to as price accommodation."*
>
> *"In addition, competitive constraints will be weakened to the extent that customers are not willing and/or able to switch from one competitor to another."*

5.334 In assessing whether the loss of the NaviCorp symbol groups as close competitors in the market for the provision of CMB services resulting from the Proposed Transaction is likely to result in an SLC, the Commission has therefore also considered the following:

a) **Closeness of competition.** The EC Horizontal Merger Guidelines note that *"[t]he higher the degree of substitutability between the merging firms' products, the more likely it is that the merging firms will raise prices significantly"*, while also noting that *"[t]he merging firms' incentive to raise prices is more likely to be constrained when rival firms produce close* *substitutes to the products of the merging firms than when they offer less close substitutes."*[653]

b) **Elimination of competitive force.** The EC Horizontal Merger Guidelines state that *"[s]ome firms have more of an influence on the competitive process than their market shares or similar measures would suggest. A merger involving such a firm may change the competitive dynamics in a significant, anticompetitive way, in particular when the market is already concentrated"*.[654]

c) **Barriers to entry and expansion.** The Commission's Merger Guidelines note that *"[m]arket power may be constrained by the occurrence or threat of new entry. A merger is unlikely to lead to an SLC if entry into the market is sufficiently easy such that market participants, post-merger, could not maintain a price increase above pre-merger levels"*.[655] They furthermore note that *"[h]arm to competition threatened by a merger may also be constrained by the ability of rivals profitably to expand production in response to higher prices"*.[656]

d) **Potential constraints from self-supply.** The ability of customers to self-supply—to not purchase from any of the remaining suppliers in the market—may, if sufficiently substantial, reduce or remove the likelihood of an SLC.

e) **Indirect constraints.** The Commission considers whether other factors have the potential to counteract a potential SLC in this market. Factors which will be considered include: potential constraints as a result of

[653] EC Horizontal Merger Guidelines, paragraph 28.

[654] EC Horizontal Merger Guidelines, paragraph 37.

[655] Merger Guidelines, paragraph 6.1.

[656] Merger Guidelines, paragraph 6.19.

downstream competition; and potential constraints as a result of competition at the wholesale level.

5.335 Each of the above factors is assessed in turn below. The Commission sets out the views of the Parties, the views of third parties, the evidence provided to the Commission and its analysis.

Closeness of competition

5.336 The Commission has examined a number of factors in order to determine the extent of the closeness of competition between Uniphar and NaviCorp in the market for the provision of CMB services. The Commission's approach to assessing closeness of competition is set out above in paragraphs 5.63 to 5.65 in the context of the market for the provision of buying group services, and applies also to the Commission's approach to analysing the market for the provision of CMB services.

5.337 In examining closeness of competition, the Commission first assesses switching by pharmacies between providers of CMB services. The Commission then considers other factors that may indicate the level of rivalry which exists between Uniphar and NaviCorp, as well as third party competitors, and evidence of the degree of substitutability between their services.[657]

Views of the Parties

5.338 The Parties provided evidence of retail pharmacies who had left their CMB groups between 2018 and 2022.

5.339 In response to its Phase 2 RFI, NaviCorp supplied data on retail pharmacies who had left either *StayWell* or *CarePlus*:

[657] EC Horizontal Merger Guidelines, paragraph 28.

a) From 2018 to 2022, [redacted] retail pharmacy left *StayWell*. [redacted] and

b) From 2015 to 2022, [redacted] retail pharmacies left *CarePlus*. [redacted][658]

5.340 In response to its Phase 2 RFI, Uniphar supplied data on pharmacies who had left either *Life Pharmacy* or *Allcare*. From 2015 to 2021:

a) [redacted] retail pharmacies left *Life Pharmacy* to join [redacted]

b) [redacted] retail pharmacies left *Allcare* to join [redacted]

c) No retail pharmacy left *Life Pharmacy* or *Allcare* to join a [redacted].[659]

5.341 The Frontier Report provided further information on switching. According to the Frontier Report, of the [redacted] retail pharmacies to join either NaviCorp's symbol groups or Uniphar's symbol groups from 2019 onwards,[660] [redacted] were recruited from another provider of CMB services, and [redacted] were independent pharmacies.[661] The Frontier Report also stated that [redacted] of the [redacted] retail pharmacies that left NaviCorp or Uniphar's symbol groups switched to another provider of CMB services.[662]

[658] NaviCorp Response to Phase 2 RFI, Q43. One of these retail pharmacies was sold and became part of a common-ownership group.

[659] Uniphar Response to Phase 2 RFI, Q44.

[660] The Commission notes that the time period used in paragraph 100 of the Frontier Report to analyse switching differs the time period used in Uniphar and NaviCorp's respective Responses to the Phase 2 RFI. See Uniphar Response to Phase 2 RFI, Q44, and NaviCorp Response to Phase 2 RFI, Q43.

[661] Frontier Report, paragraph 100.

[662] Frontier Report, paragraph 100. See also Figure 9 and Figure 10.

5.342 Uniphar also provided information on recruitment and loss of pharmacies by some of its competitors. According to Uniphar, *Haven* has gone from [redacted] members in 2017 to [redacted] members in 2021 and *totalhealth* has gone from [redacted] members in 2017 to [redacted] members in 2021.[663]

5.343 The Frontier Report commented on the nature of competition between providers of CMB services:

> *" it is the potential to acquire new customers that primarily drives both competition between models and from other CMB services providers"*[664]

> *'the majority of switching is between business models, rather than within business models"*[665]

> *"switching by existing pharmacy customers to another CMB provider is not a main driver of competition between CMB service providers. Rather, competition for existing customers (which are the majority of symbol pharmacies) is driven by the threat of those customers switching to other business models (i.e. competition between business models)."*[666]

5.344 The Parties provided evidence on why retail pharmacies may decide to switch.

5.345 In the Merger Notification Form the Parties stated:

> *"There are no switching costs for pharmacies in switching buying groups or franchisee groups, other than differentials in membership fees and*

[663] Uniphar Response to Phase 2 RFI, Q43(ii)(i), Table 1.

[664] Frontier Report, paragraph 96.

[665] Frontier Report, paragraph 100.

[666] Frontier Report, paragraph 103.

prices at which the buying groups have negotiated supply, and administrative time in switching supplier (which is not significant)";[667]

"barriers to exit for franchisees/members are low in that a pharmacy may terminate a franchise agreement on three months' notice. Accordingly, switching is straightforward." [668]

5.346 NaviCorp discussed why pharmacies leave or join *StayWell* or *CarePlus*:

"In Navi's experience, when a pharmacy leaves a symbol/franchise group it does so because it does not like or does not see the benefit of the symbol group/common brand offering or does not engage with the operating model correctly. They tend to revert to being an independent pharmacy. Due to the fact that they have not found benefits in the symbol group/common brand offering, they tend, generally speaking, not to join a different symbol group." [669]

5.347 However, NaviCorp also stated:

"… [redacted]*."* [670]

[667] Merger Notification Form, section 4.4.

[668] Merger Notification Form, section 5.3.

[669] NaviCorp Response to Phase 2 RFI, Q44.

[670] NaviCorp Response to Phase 2 RFI, Q43.

5.348 Further evidence provided to the Commission from the Parties on the costs of joining a CMB provider included the following:

- Internal Uniphar documents submitted in response to the Phase 1 RFI showed that the costs of joining the *Allcare* Pharmacy group involved ‘[redacted]”.[671] In addition to this, new joiners had to pay a one-off onboarding fee of €[redacted].[672] In order to facilitate switching between CMB providers, Uniphar offered [redacted][673]

- A separate Uniphar internal document submitted in response to the Phase 1 RFI estimated the typical fit out/ branding costs[674] for rival providers of CMB services: *totalhealth* €[redacted] *CarePlus* greater than €[redacted] *StayWell* €[redacted] and *Haven* [redacted][675]

- In response to the Phase 2 RFI, Uniphar stated that the costs of branding can vary from €[redacted] to €[redacted] depending on the size of the pharmacy and the level of in store fit out being targeted.[676]

- In response to the Phase 2 RFI, NaviCorp said that ‘[redacted]”[677]

[671] Uniphar document, “Symbol Model Comparison – Internal Review”, slide 1, Uniphar Response to Phase 1 RFI.

[672] Uniphar document, “Symbol Model Comparison – Internal Review”, slide 1, Uniphar Response to Phase 1 RFI.

[673] Uniphar document, “Symbol Model Comparison – Internal Review”, slide 1, Uniphar Response to Phase 1 RFI.

[674] The Commission understands that loan support is available from some, but not all CMB providers.

[236] Uniphar document, “*Symbol Comparison workings – Allcare, Life & Market*”, Uniphar Response to Phase 1 RFI. The figure for *Haven* has a question market next to it, suggesting the estimate of €100k is less precise.

[676] Uniphar Response to Phase 2 RFI, Q35.

[677] NaviCorp Response to Phase 2 RFI, Q38(v).

5.349 The Parties also commented on the time associated with joining a CMB group.

- In response to the Phase 2 RFI, Uniphar said that based on its experience over the last 5 years *"the recruitment process in most cases can be a slow process and, in some cases, can take in excess of* [redacted] *from the initial sales call to joining a symbol brand"*.[678]

5.350 When considering its symbol groups' closest competitors in the provision of CMB services, NaviCorp noted that:

> *"In terms of other symbol groups and franchises, Navi considers that* [redacted] *However in [sic] Navi would consider* [redacted] *to be the closest franchise offering to CarePlus";*[679] and
>
> *"Navi considers* [redacted] *to be StayWell's closest competitor however it recognizes that* [redacted] *or* [redacted]*".*[680]

5.351 When considering its symbol groups' closest competitors, Uniphar did not explicitly identify the closest competitor of either *Life Pharmacy* or *Allcare*, but noted that both symbol groups' key competitors include *totalhealth*, *Haven*, *CarePlus*, *StayWell*, *Pure* and *Lloyds*.[681]

5.352 In response to Commission questions regarding the closeness of competition between different symbol groups, Uniphar stated that:

> *"Key areas of competition between symbol groups are:*

[678] Uniphar Response to Phase 2 RFI, Q46.

[679] NaviCorp Response to Phase 2 RFI, Q33.

[680] NaviCorp Response to Phase 2 RFI, Q33.

[681] Uniphar Response to Phase 2 RFI, Q35.

• *brand proposition / member recruitment / store fit out / marketing support;*

• *member involvement;*

• *dispensary & retail buying – range and procurement margin;*

• *business support / intelligence and quality of service;*

• *health services;*

• *technology & digital solutions;*

• *membership fees; and*

• *consistency of supply";*[682]

5.353 One area of competition which Uniphar believes distinguishes the *Life Pharmacy* model from other symbol/franchise models is the participation of the pharmacy member in the ownership structure of the symbol group. *Life Pharmacy* is operated by Independent Life Pharmacy plc (ILP), a 50:50 joint venture between Uniphar plc (50%) and the pharmacy members (50%). ILP owns the Life Pharmacy trademark and is operated by the board of directors of ILP, a majority of whom are appointed by the pharmacy members.[683]

5.354 In its response to the Phase 2 RFI, Uniphar provided a table rating the services offered by six providers of CMB services:

Table 13 – Uniphar ratings of CMB providers' offers in the State. [684]

[682] Uniphar Response to Phase 2 RFI, Q35.

[683] Uniphar response to Phase 2 RFI , Question 35.

[684] The scale used by Uniphar is 1 is very poor and 5 is very good. Uniphar noted that it scored each group under the listed headings based on an internal benchmark of the key areas of competition. Uniphar did not provide further detail as to how its rankings were assigned.

	Brand Proposition	*Dispensary & Retail Buying/ Range*	*Health Services*	*Member Involvement*	*Business Support Intelligence & Quality of Service*	*Technology & Digital Solutions*	*Member Fees*
Allcare	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Life Pharmacy	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
totalhealth	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Haven	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
CarePlus	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
StayWell	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Pure	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Lloyds	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Source: Uniphar.[685]

5.355 In contrast to the Uniphar' views of differentiation set out in Table 13 above, the Frontier Report stated that:

> *"…CMB services are largely homogenous. The main aspect of differentiation relates to the brand. As the market research documents reveal, Uniphar and Navi are not necessarily closer than any other retail brands. In fact, what the market research shows is that Uniphar and Navi compete strongly against all other pharmacy brands including national vertically integrated firms and local common ownership groups. This closeness of rivalry will not be lost as a result of the transaction."*[686]

<u>Views of Third Parties</u>

[685] Uniphar Response to Phase 2 RFI, Question 35.

[686] Frontier Report, paragraph 134.

5.356 The Commission sought the views of third parties on the costs and other barriers faced by retail pharmacies when switching between providers of CMB services. Specifically, the Commission issued 2 questionnaires to pharmacies across the State, receiving 35 responses in total. In the First Pharmacy Questionnaire retail pharmacies were asked the following question: *"Have you switched between pharmacy symbol groups and/or pharmacy franchise groups in the last 5 years? Please explain why you have or have not switched between pharmacy symbol groups and/or pharmacy franchise groups during this period"*. 14 retail pharmacies responded to the First Pharmacy Questionnaire, of which 6 answered the above question as follows[687]:

"No – cost of refitting";[688]

"life pharmacy to axium";[689]

"No";[690]

"No, I have only been a pharmacy owner for 4 years and am happy to stay";[691]

"NO";[692] *and,*

"I haven't due to familiarity and costs involved".[693]

[687] 8 retail pharmacies did not respond to this question.

[688] Pharmacy 8, Response to the First Pharmacy Questionnaire, saved as "Pharmacy 8 response – redacted".

[689] Pharmacy 14, Response to the First Pharmacy Questionnaire, saved as "Pharmacy 14 response_Redacted".

[690] Pharmacy 15, Response to the First Pharmacy Questionnaire, saved as "Pharmacy 15 response_Redacted".

[691] Pharmacy 7, Response to the First Pharmacy Questionnaire, saved as "Pharmacy 7 response_Redacted".

[692] Pharmacy 12, Response to the First Pharmacy Questionnaire, saved as "Pharmacy 12 Response_Redacted".

[693] Pharmacy 18, Response to the First Pharmacy Questionnaire, saved as "Pharmacy 18 Response".

5.357 In the Second Pharmacy Questionnaire retail pharmacies were asked variations of the following question: *"Have you ever switched or considered switching between buying groups (or symbol/franchise groups)? If so, how easy or difficult is it to switch between buying groups (symbol/franchise groups)? If not, what has stopped you?"* Below are the six responses that related to symbol groups[694]:

> *"No, I haven't considered it. I'm happy enough with Staywell";*[695]
>
> *"N/A";*[696]
>
> *"No";*[697]
>
> *"I am involved in 6 different shops. One in StayWell, one independent, one is AllCare, one is Life, another is Total Health that is now changing to Life. UniPhar [sic] are behind Life and AllCare. I am a UniPhar customer, I was a shareholder. I was in fairly deep in with them. I was happy to go to StayWell. I don't want all of my eggs in one basket";*[698]
>
> *"I have considered it but have never switched, due to convenience, and the level of service";*[699] and

[694] Retail pharmacies responded to the Second Questionnaire via an online form or a phone call. When completed over the phone, the question was sometimes phrased as "*Have you ever switched or considered switching between buying groups (or symbol/franchise groups)? If so, how easy or difficult is it to switch between buying groups (symbol/franchise groups)? If not, what has stopped you?"* Consequently, some answers did not relate to symbol groups.

[695] Pharmacy 20, Response to the Second Pharmacy Questionnaire, saved as "Pharmacy 20 Response 2nd questionnaire_Redacted.pdf".

[696] Pharmacy 29, Response to the Second Pharmacy Questionnaire, saved as "Pharmacy 29 Response 2nd Questionnaire_Redacted.pdf".

[697] Pharmacy 23, Response to the Second Pharmacy Questionnaire, saved as "Call with Pharmacy 23_Redacted.pdf". It is unclear if this response relates solely to switching between buying groups, switching between symbol groups, or both.

[698] Pharmacy 27, Response to the Second Pharmacy Questionnaire, saved as "Call with Pharmacy 27_Redacted.pdf ".

[699] Pharmacy 30, Response to the Second Pharmacy Questionnaire, saved as "Call note with Pharmacy 30_Redacted.pdf". It is unclear if this response relates solely to switching between buying groups, switching between symbol groups, or both.

"I haven't switched. I looked at others, but I didn't see any competitive advantages"[700]

5.358 Of these examples, one retail pharmacy is in the process of switching from *totalhealth* to *Life Pharmacy*, nine retail pharmacies had not switched providers of CMB services and one retail pharmacy had switched from *Life Pharmacy* to Axium, which is a buying group and not a CMB provider. This would have entailed this retail pharmacy sourcing buying group services through Axium, and sourcing other services provided by symbol groups elsewhere, or via self-supply. Two of the retail pharmacies noted the costs involved to switch providers of CMB services as a reason they had not switched.

5.359 The Commission asked CommCare (*totalhealth* and *Haven*) about the extent of switching in the market for the provision of CMB services:

"The CCPC asked if Commcare sees much switching between symbol groups. Commcare explained that they don't really. Commcare explained that pharmacies don't really switch between brands, as with other brands they are tied in much tighter. They are tied in either financially or they would have to give significant notice. Commcare explained that if a totalhealth or Haven pharmacy wanted to leave the brand they can. Commcare explained that most of the switching which occurs is when the pharmacy is changing hands or is being sold."[701]

[700] Pharmacy 31, Response to the Second Pharmacy Questionnaire, saved as "Call with Pharmacy 31_Redacted.pdf". It is unclear if this response relates solely to switching between buying groups, switching between symbol groups, or both.

[701] CommCare Call Note, dated 16 November 2022, p. 2, saved as 2022.11.16 Call with Commcare - with Commcare's revisions.pdf. CommCare noted earlier in this call that *"a lot of pharmacies that want a brand over their door already has one. Haven and totalhealth pharmacies sign them up to a licence agreement* [redacted] *Commcare explained that the company is owned by the members and it is not designed exclusively to be a profit making company rather it's a support company for members*". The Commission understands that this statement refers solely to CommCare.

5.360 The Commission did not receive any other views from third parties on the on the costs and other barriers faced by retail pharmacies when switching between providers of CMB services.

Views of the Commission

5.361 The Commission considers that Uniphar and NaviCorp are close competitors in the market for the provision of CMB services in the State.

5.362 The switching data provided to the Commission indicates that there is very little switching between symbol groups. The Commission notes that, while an agreement with a CMB provider can be terminated subject to notice periods, the cost of switching between symbol groups is significant and includes re-branding, re-fitting and making any required changes to technologies and processes. An assessment of switching is therefore not instructive in assessing closeness of competition.

5.363 In order to fully consider closeness of competition, the Commission examined a number of additional factors, including: the monitoring of competitors; pricing; and technology.

5.364 The way in which a company monitors its competitors can often give an insight into the company's perception of the significance of competitive threat from those competitors.

5.365 Uniphar [redacted]

[702] Uniphar Response to Phase 2 RFI, Q36, and the accompanying folder of documents.

5.366 An example of NaviCorp monitoring its competitors is evidenced in a [redacted].[703] Of those surveyed, Uniphar's symbol groups were the only symbol groups that were evaluated. The evidence provided by the Parties on the monitoring of competitors shows that both Uniphar and NaviCorp monitor a range of entities. The Commission does not agree with the Parties' view that monitoring the quality and performance of different business models of pharmacy undermines the closeness of competition between the Parties. The Commission would expect the Parties to monitor the impact of different business models in the retail pharmacy market, and would expect that their findings would form a significant part of the Parties' marketing of the benefits associated with their respective symbol groups. However, in terms of the market for the provision of CMB services in the State, the Parties clearly monitor each other.

5.367 In examining the extent to which **pricing** may indicate closeness of competition in the market for the provision of CMB services, the Commission notes that there are two elements to consider. Firstly, a pharmacy will pay a membership fee or agree a revenue sharing arrangement with the respective symbol group. Secondly, pharmacies will pay for the cost of refitting their store to adopt the symbol group's branding.

5.368 Uniphar stated the following about the factors pharmacists consider when deciding to join a symbol group:

> *"When considering whether to join a franchise/symbol model, pharmacists assess the actual cost of common management and branding and the perceived value, pay back and return on investment for an*

[703] NaviCorp document "LIMA_00024312_Exported_Native_File.XLSX", NaviCorp Response to Phase 2 RFI, Q34.

independent pharmacist. In the case of all symbols, the base requirements for branding are relatively uniform however the costs of fitout vary significantly across the brands depending on the level of technology and fit out materials being used".[704]

5.369 [redacted][706]

5.370 NaviCorp's Response to the Phase 2 RFI indicates that it considers [redacted] to be *CarePlus*' closest competitor with respect to membership fees.[707] NaviCorp noted that [redacted] or [redacted] could be the closest symbol group offering to *StayWell*, and that similar to *StayWell*, [redacted] advertises [redacted] as having a *"low cost of re-branding"*.[708] In contrast to *StayWell*, NaviCorp positions *CarePlus* as a premium brand, with refit costs €[redacted] to €[redacted] An example of NaviCorp's view of its competitors' pricing can be seen in a 2019 internal document titled '*Pipeline Update'*, in which [redacted]

[704] Uniphar Response to Phase 2 RFI, Q35.

[705] NaviCorp Response to Phase 2 RFI, Q36.

[706] NaviCorp Response to Phase 2 RFI, Q36.

[707] NaviCorp Response to Phase 2 RFI, Q33(i).

[708] NaviCorp Response to Phase 2 RFI, Q33.

[redacted]"[709]

5.371 Uniphar has said that *"Under the heading of brand proposition and store fit out, Uniphar would see Life Pharmacy competing closely with* [redacted]*,* [redacted] *and* [redacted] *with* [redacted] *seen as a cheaper low-cost model alternative in terms of branding and store fit out"*.[710] An internal Uniphar document listed *Allcare* and *Life Pharmacy* as having typical refitting costs of €[redacted][711]

5.372 The evidence provided by the Parties demonstrates a) differentiated CMB services provided by the Parties, b) close competition in the pricing and the decision-making around the pricing of these services, and c) that the Parties view each other as close competitors in the market for the provision of CMB services in the State.

5.373 The Commission notes that the Parties also highlight **technology** as a key competition parameter.

5.374 According to Uniphar,

> *"Technology solutions is a key focus area when independent pharmacists are considering joining a symbol brand and thus all symbol brand providers compete on technology given the cost ownership for independent community pharmacy and the changing digital landscape."*[712]

[709] NaviCorp document "*LIMA_00006696_Exported_Native_File.pptx*", dated 13 March 2019, NaviCorp Response to Phase 2 RFI, Q34.

[710] Uniphar Response to Phase 2 RFI, Q35.

[711] Uniphar document "*Symbol Model Comparisons – Internal Review.pptx.PPTX*", slides 1-2, Uniphar Response to Phase 1 RFI.

[712] Uniphar Response to Phase 2 RFI Q35.

5.375 NaviCorp provided the Commission with a table summarising its understanding of the technology features offered by CMB providers in the State:

Table 14: Technology features offered by CMB providers in the State

Competitor technology						
	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
CarePlus	[redacted]					
StayWell						
AllCare						
Life						
Haven						
totalhealth						

Source: NaviCorp.[713]

5.376 In assessing the technological features offered by Uniphar and NaviCorp's symbol groups, the Commission notes that Uniphar's *Allcare* and *Life Pharmacy* offer a similar range of features to NaviCorp's *CarePlus* brand. Other CMB providers generally offer fewer technological features.

5.377 The Commission's view is that the Parties offer similar technological services through their CMB providers, and that they compete closely on technology offered to their members.

<u>Conclusion on closeness of competition</u>

5.378 The Commission has considered a range of factors in paragraphs 5.337 – 5.377 above in coming to its view on closeness of competition. In weighing up all these factors and evidence provided by the Parties and third parties, the Commission's

[713] NaviCorp Response to Phase 2 RFI Q32.

conclusion is that Uniphar and NaviCorp compete closely in the market for the provision of CMB services in the State. The Commission has come to this conclusion based on the following:

a) There is very little switching between CMB providers, largely due to the cost of branding and the sunk costs involved in being part of a brand. Competition is primarily for new customers that have not previously been part of a brand and have not purchased CMB services. Uniphar and NaviCorp compete closely for new customers, as evidenced, for example, by their monitoring of each other; and

b) A comparison of services offered by the Parties shows that they compete closely, particularly with respect to pricing and technology services.

Barriers to entry and expansion

5.379 The Commission assessed barriers to entry and expansion in the market for the provision of CMB services in the State.

5.380 In considering barriers to entry and expansion, the Commission seeks to assess, in relation to the market for the provision of CMB services, the extent to which market power may be constrained by the occurrence or threat of new entry, or by the ability and potential of rivals in the market to profitably expand production. In both cases, the entry and/or expansion needs to be timely, likely and sufficient. See paragraphs 5.133 to 5.134 above for further detail on the Commission's approach.

5.381 The Commission will first assess barriers to expansion, before progressing to assess barriers to entry. This section contains:

a) Views of the Parties;

b) Views of third parties;

c) Barriers to expansion in the market for CMB services;

d) Barriers to entry in the market for CMB service;

e) Potential entry or expansion in the market for CMB services; and

f) The Commission's conclusions on barriers to entry and expansion.

Views of the Parties

5.382 In the Merger Notification Form, the Parties stated that:

> *"barriers to entry/expansion are low. CarePlus was launched in 2015 and grew to [redacted] stores five years later whereas StayWell was launched at the end of 2018 and three years later had [redacted] members."*[714]

5.383 The Supplementary Economics Report stated:

> *"If attention is instead focused narrowly on symbol groups, then Uniphar would be acquiring two more symbols/franchises (namely, CarePlus and StayWell) to add to its two existing symbols/franchises (namely, Allcare and Life). The remaining symbols would include totalhealth and Haven (both owned by CommCare after a relatively recent merger) and Pure Pharmacy, which the author understands has recently expanded itself from a retail group into a symbol (and even more recently the author understands into a buying group). The author also understands that Lloyds has a limited symbol/franchise presence, but one that could surely be expanded relatively easily should the appropriate opportunities arise. As previously mentioned, Alitam may also pursue a symbol/franchise type approach to its market entry."*[715]

5.384 In the Written Response, the Parties stated:

[714] Merger Notification Form, p. 25.

[715] Supplementary Economics Report, p. 27.

"The Assessment has considered barriers to entry and expansion together. In doing so, the Assessment has not fully considered the ability of existing competitors to expand and constrain Uniphar post-acquisition and any substantive analysis of the constraint from existing competitors is missing from the Assessment.

We consider it is more appropriate to consider barriers to expansion and entry separately. This is because the factors that have been identified as entry barriers in the Assessment do not necessarily apply to the ability of existing competitors to expand.

Assessing barriers to expansion is important because – even using the Assessment's narrow market definition – this would be a 6-to-5 merger in CMB services, and thus a lack of meaningful barriers to expansion mean that existing competition would be sufficient to constrain the merged entity.

As set out below, there are no expansion barriers to prevent existing competitors expanding to compete with Uniphar and, as such, Uniphar will continue to be constrained by existing competition post-acquisition." [716]

5.385 The Parties also noted that:

"The Assessment found that set up and operational costs are likely to be significant barriers to entry. This fails to take into account that likely entrants would not have to incur all of these costs separately, as they already have brands and systems in place, and could leverage their existing operational set up into providing CMB services."[717]

"The Assessment also finds that achieving the required scale is a material barrier to entry and expansion. Again, the Assessment appears to have

[716] Written Response, paragraphs 8.145 to 8.148. See also Frontier Report, paragraph 137.

[717] Written Response, paragraph 8.156.1.

reached this view based on an assumption that likely entrants do not already have scale or brand awareness. However, as described in section below, likely entrants have both access to significant scale and wide brand awareness, such that this is unlikely to be a material barrier to entry for them."[718]

5.386 Finally, the Parties also provided further argument on the barriers to entry and expansion in the provision of CMB services identified by the Commission in the Assessment. These points are discussed below in the relevant sections.

<u>Views of third parties</u>

5.387 *Pure* outlined its experience of offering CMB services:

> *"[Pure] explained that the franchise side of Pure is more of a "side-show", and that the main rate of growth is within the core shareholding pharmacies. [Pure] stated that this aspect of the business was setup to see whether it might take off, and has not seen a particularly high level of growth over the past few years."*[719]

5.388 United Drug, whose parent company owns the pharmacy retail chain Lloyds, said that:

> *"Lloyds has two franchisee* [redacted] *The Lloyds franchise offering is currently dormant and had been for several years and is currently not available for new entrants"*[720]

[718] Written Response, paragraph 8.156.2.

[719] *Pure* Call Note, dated 16 June 2022, p. 1, saved as "2022.06.16 Call with CCPC - non-confidential_Redacted".

[720] United Drug Response to Information Request, Q17, saved as "01.07.22- 22.08.22 Non-confidential_Redacted".

"[redacted]".[721]

The Commission's assessment of barriers to expansion and entry

5.389 The Commission's assessment of the barriers to expansion and entry is set out as follows:

a) Barriers to expansion in the market for the provision of CMB services.

   (i) The history of expansion in the market for the provision of CMB services.

b) Barriers to entry in the market for the provision of CMB services.

   (i) Barrier to entry 1 – set-up and operating costs.

   (ii) Barrier to entry 2 – recruiting members and acquiring scale.

   (iii) The history of entry in the market for the provision of CMB services.

c) Potential entry or expansion in the market for the provision of CMB services.

   (i) Potential expansion by existing competitors.

   (ii) Potential entry by a provider of buying groups services.

   (iii) Potential entry by common-ownership groups.

[721] United Drug Response to Information Request, Q18, saved as "01.07.22- 22.08.22 Non-confidential_Redacted".

(iv) Potential entry by full-line wholesalers.

(v) Potential entry by other entrants.

d) The Commission's conclusions.

Barriers to expansion in the provision of CMB services

5.390 The Commission does not agree with the Parties' characterisation of the Proposed Transaction as a 6-to-5 merger in the provision of CMB services. As set out in paragraphs 3.87 and 5.389, neither *McCabes* nor *Lloyds* are active competitors in the market. Even treating *Pure* as an active competitor in the market, the Proposed Transaction would result in three competitors remaining in the market.

5.391 The Written Response also stated that the Assessment did not take an appropriate approach to considering barriers to expansion.[722] In the Parties' view, the Assessment had failed to consider the following factors:

> *"The number of rivals capable of expanding output and sales. As noted above, there would be four competitors to Uniphar capable of expanding output.*
>
> *The level of rivals' spare capacity. There are no meaningful capacity constraints in CMB services as the franchise model is designed to effectively reduce CMB providers' capacity constraints by partnering with pharmacies.*
>
> *The cost of expanding output. The incremental cost of expanding output is low, as the pharmacy is the party that takes on the upfront cost of shop fit out, etc. The incremental cost of expanding output is just the internal resources required to contract with, and serve, additional symbol pharmacies.*

[722] Written Response, paragraphs 8.153 to 8.154.

The ability of rivals to source increased inputs and successfully market increased output to customers. There are no meaningful constraints to sourcing inputs as CMB services can be easily expanded. These services can be marketed directly to customers, as they are easily identifiable.

The level of excess capacity held by the merged entity that could be deployed to prevent rivals from capturing sales. While the merged entity can expand its capacity, it does not have excess capacity at present as CMB are services which are rolled out to customers with incremental costs, rather than being – say – the production of a good where excess capacity can be deployed. This is not therefore a relevant consideration."[723]

5.392 The Commission does not consider there to be significant structural barriers to expansion in the market for CMB services, such as capacity constraints. The Commission does note, however, that there are very low levels of switching within the market (as set out in paragraphs 5.339-5.344), and that, therefore, expansion in the market is likely to rely on recruitment of completely new symbol group members. The information in Table 10 above shows that membership numbers grew from 2018 to 2021 at an average annual rate of 5.9% per year. The Commission notes that, if the market were to continue to grow at this rate, it is highly unlikely that an entrant or expander could grow scale sufficiently quickly to replace the competitive constraint exerted by NaviCorp. Consequently, the lack of switching between symbol groups is a barrier to expansion.

5.393 The Commission also notes that barrier to entry 2: recruiting members & acquiring scale, as described in paragraphs 5.400 - 5.406, is likely to also be a barrier to expansion for smaller competitors in the market.

History of expansion in the provision of CMB services

[723] Written Response, paragraphs 8.155.1 to 8.155.5. See also Frontier Report paragraphs 139 to 141.

5.394 The information in Table 10 above shows membership numbers from 2018 to 2021 and that total member numbers have increased over time, from [redacted] to [redacted]. Given these increasing aggregate membership numbers, the Commission finds that it is informative to look at changes in market share over time. This is because changes in market share will indicate changes in the relative strength of competitors. The data shows that Uniphar's two brands *Allcare* and *Life Pharmacy*, had a small decrease in market share from [40-50]% to [40-50]% between 2018 and 2021. NaviCorp's two brands *CarePlus* and *StayWell* expanded from a share of [10-20]% to [20-30]% during this time. CommCare's two brands *Haven* and *totalheath* declined from a share of [40-50]% to [30-40]% and *Pure*'s share increased from [0-10]% to [0-10]%.

5.395 This evidence shows that none of the existing competitors has seen growth in market shares recently of the magnitude that an entrant or expander would need to ameliorate the Commission's SLC concerns.

Barriers to entry in the market for the provision of CMB services

Barrier to entry 1: set-up & operating costs

5.396 A potential new entrant into the market for the provision of CMB services would incur set-up costs.

5.397 As detailed in paragraph 2.73 of Section 2, the key feature of a CMB provider is the use of a common brand by all members. Uniphar stated that *"a guide estimate for developing the brand is* [redacted] *depending on the level of brand design and livery elements."*[724] This is a sunk cost. In their Phase 2 RFI Response, NaviCorp outlined the costs it incurred in setting up *CarePlus* and *StayWell*. These are set out in the table below.

Table 15: CarePlus and StayWell, first year set up costs

[724] Uniphar Response to Phase 2 RFI, Q40(i).

CarePlus and StayWell – 1st Year Set Up Costs		
	CarePlus (2014)	StayWell (2018)
Fixed Assets	€[100,000-150,000]	€[10,000-15,000]
Marketing and Brand Development	€[100,000-150,000]	€[250,000-300,000]
Payroll Cost	€[200,000-250,000]	€[100,000-150,000]
Total	€[300,000-350,000]	€[450,000-500,000]

Source: NaviCorp.[725]

5.398 Speaking to what is required to run an efficient and effective CMB provider group, Uniphar noted that an IT infrastructure needs to be established to support the provision of key services.[726] Uniphar estimated the cost of developing *"a head office cascade system, business intelligence stack and various system integrations can range from €1*[redacted] *- €*[redacted] *depending on the level of sophistication and integration layers across the systems".*[727] These are largely sunk costs. Reflecting the growing role of technology within the market for the provision of CMB services, Uniphar outlined that it has invested heavily in *Life Pharmacy* and *Allcare*'s digital solutions, including e-commerce, online doctor services, patient apps, and system and back-office integrations. Summarising its recent activity Uniphar stated that:

[725] NaviCorp Response to Phase 2 RFI, Q38.

[726] Uniphar Response to Phase 2 RFI, Q40 (i).

[727] Uniphar Response to Phase 2 RFI, Q40 (i).

"Uniphar has invested significant financial and time resources to arrive at the solutions both symbol/franchise brands deliver today. Investment in the team and supporting infrastructure has been a key focus to set-up both brands for future success."[728]

5.399 NaviCorp identified several types of technology platforms necessary to efficiently operate a CMB provider. [redacted] The Parties also noted in the Written Response that *"likely entrants would not have to incur all of these costs separately, as they already have brands and systems in place, and could leverage their existing operational set up into providing CMB services"*.[729] The Commission addresses potential entry by a range of firms at paragraphs 5.442 – 4.456 below, some of which will, as the Parties have stated, have brands and systems in place.

Barrier to entry 2: recruiting members & acquiring scale

5.400 Generating scale is important for three main reasons.

5.401 Firstly, owing to the aforementioned set up costs, CMB providers require a membership of sufficient scale to be profitable. As Uniphar notes:

"To run an effective symbol brand even with small membership requires a cross functional head office support team and system costs and costs associated with the provision of any additional support services. The greater the economies of scale, the more efficiencies a symbol group would see in the provision of these services and the quicker the symbol operator would realise a return on investment." [730]

[728] Uniphar Response to Phase 2 RFI, Q40 (v).

[729] Written Response, paragraph 8.156.1.

[730] Uniphar Phase 2 RFI Response, question 40, p. 27.

5.402 Similarly, generating sufficient scale helps CMB providers keep their membership fees at a competitive level. Uniphar, discussing ongoing marketing and digital costs of maintaining the common brand's reputation and recognition, noted how these costs *"are incorporated into the membership fees paid by members. However, in order to be cost effective on a per member basis, an element of scale is required."*[731]

5.403 Secondly, where a CMB provider is also providing buying group services, which is often done via an affiliated buying group, scale is important as it relates to the ability of the group to obtain manufacturer-funded discounts for its members. The role of group size, technology and compliance, as discussed in paragraphs 5.160 to 5.194, in relation to barriers to entry and expansion in the market for the provision of buying group services, is also applicable to CMB providers.[732] The Commission notes that, of the four undertakings supplying buying group services, only United Drug is not an active competitor in the provision of CMB services.[733]

5.404 Lastly, generating scale is important to CMB providers due to the very nature of the business. A key feature of CMB providers is the use of a common brand by its members. CMB providers provide their members with the branding and support services to enable them to compete with common-ownership groups and large retail chains. The goal of CMB providers is to develop national retail brands for independent pharmacists.[734] The operation of a common brand can be valuable in competing at the retail-level:

> *"Being part of a recognised national retail brand helps to increase store footfall for independent pharmacies and allows local community pharmacies compete against national and international retail brands in*

[731] Uniphar Phase 2 RFI Response, question 40, p. 22.

[732] On this point, Uniphar note in its Phase 2 RFI Response: "*Symbol groups negotiate with manufacturers based on volume and compliance. Therefore, at its most simplistic, the greater the scale (i.e. volume) the better the discounts the symbol group should be able to unlock from manufacturers of POHPPs and retail front of shop products*".

[733] As noted in paragraph 5.93 above, Lloyds' CMB service offering to external independent retail pharmacies is dormant.

[734] Uniphar Phase 2 RFI Response, question 35, p. 5.

common ownership. As retail pharmacies compete aggressively for patients/consumers, retail brands are investing heavily in national and local community-based marketing campaigns to build brand awareness and ultimately drive footfall into stores. In light of this competition, the symbol brand marketing investment is key to competing against these local market pressures which in the case of a standalone independent or a pharmacy in a buying group is cost prohibitive."[735]

5.405 Therefore, CMB providers need to be able to achieve a level of brand awareness and recognition among end consumers. The Parties have acknowledged this, with Uniphar stating that *"Investing in the symbol brand and running marketing activity also requires a critical mass of symbol members in order to gain any market traction and to build consumer awareness."*[736] In its Phase 2 RFI Response NaviCorp likewise noted how *"There are certain network effects that arise by virtue of a symbol/franchise group: as members grow, brand recognition grows and therefore pharmacies find the group more attractive. However, Navi does not consider that such network effects impede entry."*[737]

5.406 The Parties also stated in the Written Response that *"likely entrants have both access to significant scale and wide brand awareness, such that this is unlikely to be a material barrier to entry for them"*.[738] The Commission assess the likelihood of entry by specific firms with scale and brand below.

The challenges of acquiring scale

5.407 The decision to join a CMB provider is a significant one for a pharmacy owner. Pharmacy owners consider a range of factors when deciding whether or not to join. One such factor is the weakening of the pharmacy's independent identity.

[735] Uniphar Response to Phase 2 RFI, Q35.

[736] Uniphar Response to Phase 2 RFI, Q40(vi).

[737] NaviCorp Response to Phase 2 RFI, Q38, paragraph 38.24.

[738] Written Response, paragraph 8.156.2.

Uniphar identifies this as a key consideration for most owners of independent pharmacies.

> *"Given that in some instances the individual independent branding carries a level of emotional attachment for some individuals or families in scenarios where the pharmacy has been passed down through family generations, independent owners may decide not to proceed with common branding and will therefore continue to avail of self-supply services and remain as a buying group member or operate as a self-supply standalone independent pharmacy."*[739]

5.408 For those pharmacies willing to adopt a common brand, the reputation of the CMB provider is important.[740] Uniphar noted how the following questions are key considerations for pharmacies who are considering joining:

- *"Has the symbol brand a proven track record in delivering pharmacy solutions?*
- *How strong are the support team and what level of on the ground support does the brand offer?*
- *Is the independent voice valued and can it influence the brand direction?*
- *What does the common branding and my name over the door look like?*
- *What does the brand investment plan look like?*
- *Who do I know that is in a symbol brand today and what has their experience been?"*[741]

739 Uniphar Response to Phase 2 RFI, Q40 (v).

740 Uniphar Response to Phase 2 RFI, Q35, p. 14.

741 Uniphar Response to Phase 2 RFI, Q40 (ix), p. 28.

5.409 As previously noted, the costs of refitting a pharmacy in order to join a CMB provider are considerable. This cost represents a serious investment for pharmacy owners and increases the challenge of generating and acquiring scale. In the Written Response, the Parties claimed that *"the Commission has not taken proper account of the fact that the investment costs vary considerably depending on Symbol Group brand and, therefore, it is not an accurate reflection to say that the investment costs are "considerable" for every brand",*[742] describing *StayWell* as a low-cost entry model with fit out costs *"*[redacted]*"*,[743] while *CarePlus* is a *"premium franchise pharmacy brand"*. The Commission does not dispute that different symbol groups have different costs associated with them, and has discussed this in paragraphs 2.68 – 2.69, but the point is that the costs are not insignificant, regardless of which symbol group is in question.

5.410 Evidently, prospective members consider a CMB provider's track record and reputation as well as brand awareness. The cost of acquiring a track record and reputation is likely to be asymmetric between undertakings with a significant presence in the industry, which already have some level of track record and reputation, and completely new entrants, who do not. The Commission's view is that a new entrant would face initial challenges in demonstrating these. To generate scale to the point of reaching a critical mass appears to be a significant hurdle facing any potential new entrant.

5.411 Finally, as set out in paragraphs 5.337 and 5.342, low levels of switching mean it is likely to be difficult to acquire scale quickly, as new entrants would have to largely rely on recruiting independent pharmacies to their symbol groups.

5.412 Consequently, on the basis of the evidence available to the Commission, it seems likely that generating and acquiring scale would act as a barrier to entry.

[742] Written Response, paragraph 5.74.

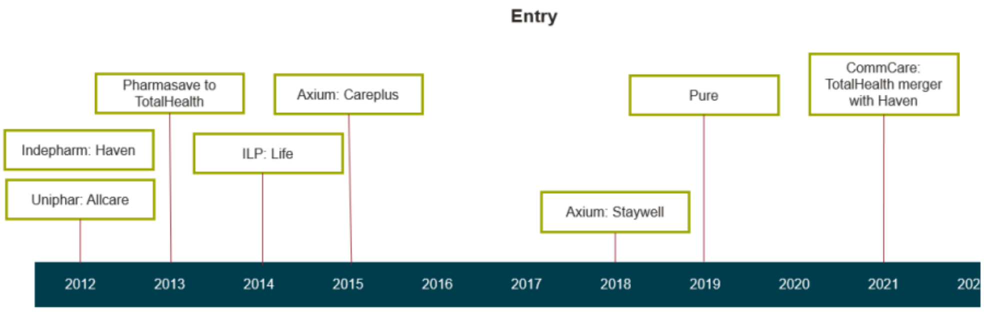
[743] Written Response, paragraph 5.75.

History of entry in the market for the provision of CMB services.

5.413 There are currently four CMB providers active in the State. As set out below, all four were able to draw on existing infrastructure and the support of businesses already active in the supply chain during their creation and subsequent efforts to acquire scale.

5.414 In the Written Response, the Parties included a figure setting out a timeline of entry in the market for the provision of CMB services:

Figure 10: Timeline of entrants of symbol groups to Irish market



Source: The Parties[744]

5.415 The Parties noted, in a note alongside this timeline, that no symbol groups have exited the market. However, with the exception of *Pure*'s very small presence in the market, the most recent new entry was NaviCorp in 2015, and the market has seen consolidation with *totalhealth*'s merger with *Haven* during this timeframe.

5.416 *Allcare*, one of Uniphar's brands, initially operated as a common-ownership group, before offering CMB services to independent pharmacies. Therefore:

[redacted]

[744] Written Submission, Figure 1. See also Frontier Report.

[redacted]"[745]

5.417 *Life Pharmacy* was created after the establishment of *Allcare*. Uniphar notes that it utilised *Allcare*'s existing infrastructure when launching *Life Pharmacy*:

"[redacted]". [746]

"[redacted]"[747]

5.418 NaviCorp's *CarePlus* and *StayWell* groups were also able to utilise Axium's [redacted][748] NaviCorp were therefore able to draw [redacted] when generating *CarePlus* and *StayWell*'s scale.

5.419 CommCare's two constituent brands, totalhealth and *Haven*, both developed from buying groups, Pharmasave and Indepharm, respectively. *totalhealth* was launched in 2013, while Haven was launched in 2015. The buying groups from which these symbol groups originated were created in the mid-to-late noughties.

[745] Uniphar Response to Phase 2 RFI, Q40(ii).

[746] Uniphar Response to Phase 2 RFI, Q40(ii).

[747] Uniphar Response to Phase 2 RFI, Q40(ii).

[748] NaviCorp Response to Phase 2 RFI, Q38(v).[redacted]

5.420 *Pure* opened its first franchise in 2019 and in 2021 had three franchises.

5.421 Based on the above, the Commission's view is that entry in the market for the provision of CMB services has typically been done by providers of buying group services, with the recent exception of *Pure*'s *de minimis* entry into the market. The Commission also notes that the most recent entrant, *Pure*, has only three members.

Potential entry or expansion

5.422 In the Written Response the Parties stated that the Commission had failed to take into account that likely entrants to the market for the provision of CMB services would not have to incur all of the entry costs separately, as they already have brands and systems in place, and could leverage their existing operational set up into providing CMB services.[749] For example the Written Response states:

> *"The Assessment also finds that achieving the required scale is a material barrier to entry and expansion. Again, the Assessment appears to have reached this view based on an assumption that likely entrants do not already have scale or brand awareness."*[750]

5.423 In response, the Commission has updated its analysis to consider potential expansion by existing competitors and potential entry by a number of different types of entrants as set out below, including whether different entrants would face differing or similar barriers to entry.

Potential expansion by existing providers of CMB services[751]

5.424 Paragraph 6.19 of the CCPC Merger Guidelines states that: *"Harm to competition threatened by a merger may also be constrained by the ability of rivals profitably*

[749] Written Response, paragraph 8.156. See also Frontier Report, paragraphs 145 to 152.

[750] Written Response, paragraph 8.156.2.

[751] United Drug / Lloyds and *McCabes* are considered here, despite not being active competitors in the market. This is on the basis that they do already provide CMB services to a small number of pharmacies, and the Commission therefore considers that they're re-entering the market is analogous to expansion.

to expand production in response to higher prices. As with new entry, expansion by rivals must be timely, likely, and sufficient to prevent an SLC. While expansion that is effective within two years is normally considered timely, the appropriate timeframe for effective expansion will depend on the characteristics and dynamics of the market under consideration."

5.425 The Frontier Report stated: *"that the ability of rivals profitably to expand production in response to higher prices would constrain Uniphar in the post-merger situation."*[752]

5.426 The Parties identified four competitors that could expand in the provision of CMB services: CommCare, United Drug, *Pure* and *McCabes*.[753]

5.427 The Written Response discusses how the barriers identified in the Assessment would relate to these competitors:

> *"**Set up and operating costs:** All three of these competitors have already incurred these costs, and thus are not a barrier to expansion.*
>
> ***Recruiting members and acquiring scale:** CommCare already has 120 pharmacies and thus already has the scale to compete. United Drug is part of the [sic] one of Europe's largest pharmaceutical companies, has currently 85 owned pharmacies in Ireland, a buying group and full-line wholesale business, and therefore scale is not an issue for it. Following the Phoenix acquisition the United Drug business will have a far greater European scale and a much broader suite of pharmacy solutions to deploy in the Irish market. Pure is the smallest of the competitors but has already shown that its own common-ownership pharmacies have the scale to*

[752] Frontier Report, paragraph 142. See also Written Response, paragraph 8.155.

[753] Written Response, paragraphs 8.149-8.150.

successfully compete, and thus adding more symbol pharmacies would only increase its scale further.

Brand: *All four competitors already have a common brand, which they have achieved through the scale of their existing businesses."*[754]

5.428 The Commission now considers each of these competitors individually.

CommCare

5.429 In the Written Response, the Parties proposed that *"As part of its future strategy CommCare is well placed to expand its CMB offering and buying group offering under the CommCare umbrella given its existing wholesale agreements, technology platforms and head office infrastructure."*[755]

5.430 CommCare noted, in a call with the Commission on 16 November 2022, that:

"The CCPC asked whether Commcare, either through Haven or totalhealth, have any ambitions to significantly increase the number of members in the coming years. Commcare explained that a lot of pharmacies that want a brand over their door already has one. Haven and totalhealth pharmacies sign them up to a licence agreement [redacted] *Commcare explained that the company is owned by the members and it is not designed exclusively to be a profit making company rather it's a support company for members"*[756]

5.431 The Commission notes that CommCare would be, following the implementation of the Proposed Transaction, one of only two remaining competitors of any significant scale. CommCare's existing market share is such that any expansion by

[754] Written Response, paragraph 8.151.1. The Frontier Report raises similar arguments at paragraph 138.

[755] Written Response, paragraph 8.149.1.

[756] CommCare Call Note, p. 2, saved as "2022.11.16 Call with Commcare - with Commcare's revisions.pdf".

CommCare can only have a very limited impact on ameliorating the increase in concentration in the market following the implementation of the Proposed Transaction.[757] The Commission thus considers that expansion by CommCare, while potentially timely and/or likely, would not be sufficient, by itself, to remove the Commission's SLC concerns in the market for CMB services.

United Drug

5.432 In the Written Response, the Parties stated that *"[w]hile Lloyds' market share of CMB is still quite small with only 2 members, it has all the required preconditions to expand further."*[758]

5.433 United Drug have informed the Commission that:

> *"Lloyds has two franchisee holders, one based in Ringsend, Dublin & one based in Westport, Mayo. The Lloyds franchise offering is currently dormant and had been for several years and it currently not available for new entrants."*[759]

5.434 In the Written Response, the Parties pointed to the purchase of United Drug by the PHOENIX Group, stating that:

> *"Uniphar believes that the* [redacted]

[757] If CommCare were to expand to exactly the same size as the merged entity, the increase in HHI compared to the counterfactual would still be 1,349.

[758] Written Response, paragraph 8.149.2.

[759] United Drug Response to Information Request, Q17, saved as "01.07.22- 22.08.22 Non-confidential_Redacted".

[redacted]"[760]

5.435 As noted above in paragraph 5.222, the Commission considers this to be inconsistent with the evidence provided to the Commission by United Drug. In an email from United Drug to the Commission on 24 November 2022, in response to queries from the Commission, United Drug confirmed that *"[a]t this stage, we are not aware of any planned changes to the service offering"*.[761]

5.436 The Commission, therefore, does not consider that the evidence suggests that entry/expansion by United Drug into the market for CMB services—without concluding on its sufficiency—would be likely or timely.

Pure

5.437 In the Written Response, the Parties stated that:

> *"In 2019 the Pure brand diversified from being a brand solely in common ownership to a retail pharmacy brand also offering a franchise solution for independent pharmacists."*[762]

5.438 With regard to set up costs, *Pure* described the franchise as a *"side-show"*, and noted that it *"has not seen a particularly high level of growth over the past few years"*.[763]

5.439 In the Written Response, the Parties asserted that:

> *"Pure does not say that it is not recruiting new members. Nor does it say that has no plans to expand."*[764]

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[760] Written Response, paragraph 8.149.2.

[761] Email from United Drug to the CCPC, 21 November 2022, saved as "2022.12.12 UD to CCPC".

[762] Written Response, paragraph 8.149.3.

[763] *Pure* Call Note, dated 16 June 2022, p. 1, saved as "2022.06.16 Call with CCPC - non-confidential_Redacted".

[764] Written Response, paragraph 4.24.

5.440 It is true that *Pure* does not explicitly rule out actively competing in the market, which is why the Commission has treated *Pure* as a competitor in the market for the provision of CMB services. *Pure* has a very low market share currently, and its primary business as a common-ownership group consists of fewer than 20 pharmacies. Therefore, in the Commission's view, it is likely that the barrier to entry around recruiting members and acquiring scale, would apply to *Pure* in the event that it began actively seeking to expand in the market for CMB services.

5.441 In light of the fact that: (i) CMB services are not part of *Pure*'s core business, and (ii) *Pure*'s market shares currently are *de minimis,* the Commission does not consider that expansion by *Pure* would be likely, timely and sufficient to prevent an SLC in the market.

Potential entry by common-ownership groups

5.442 In its response to the Phase 2 RFI, Uniphar said that existing common-ownership groups could relatively easily utilise their existing infrastructure to launch a new CMB provider.[765]

5.443 The Written Response highlighted the following two potential entrants :

> *"**The Chemist Warehouse**: The Chemist Warehouse has over 400 franchise stores in Australia, New Zealand and China. In 2020, the first Chemist Warehouse was opened in Ireland. Since then, an additional three stores have opened, with further openings planned. At the moment it operates as a common ownership group in the Irish market but could expand into CMB services. The Chemist Warehouse has scale, has already overcome the initial set-up costs and has a brand that due to its wide-spread presence internationally already has market recognition. It is already*

[765] Uniphar Response to Phase 2 RFI, Q40(i).

watched as a competitor, and is included in Coyne Research's Market Study 2021." [766]

Alitam: *Alitam was set up in 2019. As mentioned in the Assessment, two Staywell and one CarePlus pharmacy have already joined Alitam. Alitam quotes its membership numbers to be around 140 pharmacy stores across Ireland and the UK, over 20 of which seem to be located in Ireland. Once fully set up, Alitam is expected to operate at a buying group structure. Alitam has scale, has already partly overcome initial set up costs and is building a brand with pharmacies in Ireland."*[767]

5.444 The evidence supports the view that common-ownership groups would face lower barriers to entry compared to a completely new entrant with no existing links to the Irish pharmacy sector. This is because these common-ownership groups would already have some of the existing required assets, such as a brand, and would already have invested in IT infrastructure. They would also have some existing scale, due to the existing numbers of owned retail pharmacies. However, they would still face some barriers to entry, including i) the investment required to adapt their IT infrastructure to provide CMB services and ii) the investment required to recruit new members.

5.445 The Commission notes that Pharma Alliance, a common-ownership group, said that it would be too complicated to scale up their operations to a buying group level and that considerable investment would be required to compete with buying groups.[768] The investments required to create a CMB provider are larger than those required to create a provider of buying group services and therefore this evidence supports the view that a common-ownership group would require considerable investment to create a CMB provider.

[766] Written Response: paragraph 8.159.1.

[767] Written Response: paragraph 8.159.1-8.159.3.

[768] Pharma Alliance Call Note, dated 29 July 2022, p. 4, saved as "2022.07.29 CCPC Call with Pharma Alliance_Redacted".

5.446 The Commission made multiple attempts to contact both Alitam and *Chemist Warehouse* to better understand their future business plans in the State. These attempts were unsuccessful. The Commission therefore has no information to support the view that either of these two firms are likely to be entrants in a timely fashion into the market for the provision of CMB services. Furthermore, were either of these firms, or any other common-ownership group, to enter the CMB market, it would face the same low levels of switching as any other entrant, and likely need to grow on the basis of recruiting new pharmacies. This point was discussed in more detail in paragraphs 5.400-5.412.

McCabes

5.447 In the Written Response, the Parties stated that:

> *"Initial set up costs, as well as scale and brand awareness, had already been overcome. As such, McCabes could readily expand its CMB offering and become a large competitor."*[769]

5.448 In an email from *McCabes* to the Commission in response to queries about its provision of CMB services, *McCabes* noted that:

> "[redacted]."[770]

5.449 *McCabes* went on to state that:

[769] Written Response, paragraph 8.149.4. See also Frontier Report, paragraph 136.

[770] *McCabes* email to the CCPC, dated 4 June, saved as "2022.11.16 McCabes to CCPC re confidentiality.pdf.

[redacted][771]

5.450 It is clear that *McCabes* is not an active competitor in the market, but that it would consider competing if the proposition was attractive. In terms of whether this would be likely, timely or sufficient, the Commission notes that *McCabes* has a nationally recognised pharmacy brand, which it should be able to leverage. The set up and operating costs of operating a common-ownership group would also have significant overlap with CMB services. Therefore, neither of these barriers, which would apply to new entrants, are likely to apply to *McCabes*.

5.451 However, *McCabes* would still likely face some barriers to entry, including (i) the investment required to adapt their IT infrastructure to provide CMB services and (ii) the investment required to recruit new members.

5.452 The Commission considers, however, that it is unlikely that entry by *McCabes* would be sufficient. The Commission notes that, as discussed in paragraph 5.392, because of the lack of switching in the market, it is highly unlikely that an entrant or expander could grow scale sufficiently quickly to replace the competitive constraint exerted by NaviCorp. Furthermore, *McCabes* has no stated plans to enter the market, nor a track record in the market, though it would be able to leverage the *McCabes* brand. The Commission considers that *McCabes* is unlikely to be able to grow its share quickly. Therefore, the Commission does not consider entry by *McCabes* would be timely or likely to prevent an SLC and, furthermore, even if *McCabes* did enter, it would not be sufficient to prevent an SLC in the market for the provision of CMB services.

Potential entry by other firms

[771] *McCabes* email to the CCPC, dated 4 June, saved as “2022.11.16 McCabes to CCPC re confidentiality.pdf.

5.453 The Written Response highlighted [redacted] as a potential entrant:

> "[redacted] [redacted] *does not currently compete in the pharmacy market, but given its position in the* [redacted] *sector, and its broad experience in running franchise models, it could be a potential entrant into CMB services if it first entered into the common ownership segment."*[772]

5.454 [redacted] did not discuss the specific topic of entry into the provision of CMB services, but recognised that *"the pharmacy market had the potential to sit well beside a general retail business, as it does international market."*[773] [redacted] also noted that "[redacted]".[774] [redacted], however, highlighted some wider concerns related to entering the pharmacy sector, including the need to obtain a wholesaling contract with either Uniphar or United Drug and the regulatory uncertainty around what the HSE/Government would do in relation to pharmaceutical purchasing.[775]

5.455 Furthermore, the Commission therefore has no information to support the view that [redacted] is likely to enter in a timely fashion the market for the provision of CMB services. The Commission also notes that if it were to enter the market, the entry is unlikely to be sufficient, as it would face the same low levels of switching as any other entrant, and likely need to grow on the basis of recruiting new pharmacies. This point was discussed in more detail above.

5.456 This evidence received by the Commission is consistent with the view that a new entrant into the provision of CMB would face substantial barriers to entry.

[772] Written Response: paragraph 8.159.3. As noted in paragraph 155(c) of the Frontier Report, [redacted] is an Irish [redacted] wholesaler and Ireland's leading [redacted] retail company.

[773] [redacted] Call Note Non-Confidential Summary, dated 10 August 2022, p. 1, saved as "2022.08.30 [redacted] call note non-confidential summary".

[774] [redacted] Call Note Non-Confidential Summary, dated December 5 December, p. 1, saved as 2022.12.05 [redacted] call V2 [redacted] revisions.pdf.

[775] [redacted] Call Note Non-Confidential Summary, dated 10 August 2022, p. 4, saved as "2022.08.30 [redacted] call note non-confidential summary".

Conclusions on barriers to entry and expansion in the market for the provision of CMB services in the State

5.457 In considering barriers to entry and expansion in the market for the provision of CMB services the Commission has assessed the extent to which the exercise of any market power post-merger may be constrained by the ability of rivals in the market to profitably expand production and/or by the threat of new entry. In both cases expansion and/or entry needs to be timely, likely and sufficient to prevent an SLC in the market for the provision of CMB services.

5.458 With regard to expansion, the evidence shows that:

a) The need to recruit additional sales staff is likely to be a barrier to expansion for some existing competitors, particularly for *Pure*.

b) Generating scale is important to CMB providers due to the very nature of the business. A key feature of CMB providers is the use of a common brand by its members. This is a barrier to entry but is also likely a barrier to expansion for smaller competitors such as *Pure*. CMB providers need to be able to achieve a level of brand awareness and recognition among end consumers

c) CommCare would be, following the implementation of the Proposed Transaction, one of only two remaining competitors of any significant scale. CommCare's existing scale is such that any expansion by CommCare would not be timely, likely, and sufficient to prevent an SLC.

d) The evidence on recent market trends shows that only NaviCorp has achieved any net growth in membership between 2018 and 2021 and that growth has been small. Any growth in the market by existing competitors is, due to low levels of switching, likely to need to be based primarily on the recruitment of new independent pharmacies, and the Commission does not believe it would be timely, likely and sufficient to prevent and SLC. Any growth in the market by existing competitors or new entrants is, due to low levels of switching, likely to need to be based primarily on the recruitment of new independent pharmacies, and the Commission does not believe it likely this could be timely, likely, and sufficient to prevent an SLC.

e) CommCare would be, following the implementation of the Proposed Transaction, one of only two remaining competitors of any significant scale. CommCare's existing scale is such that any expansion by CommCare would not be timely, likely, and sufficient to prevent an SLC.

5.459 The Commission has considered all the factors and the evidence provided by the Parties and third parties and the appropriate weight to apply to same. The Commission's conclusion is that the evidence does not support the view that expansion by any rivals would be timely, likely and sufficient to prevent a SLC. In particular, *Pure* would likely face barriers to expansion. The evidence on recent expansion is not consistent with the view that expansion by rivals would be timely, likely and sufficient.

5.460 With regard to entry, the evidence shows that:

a) A new entrant would face two main barriers to entry: the need to incur set-up and operating costs; and the costs associated with recruiting members and acquiring scale. The first barrier, while not insurmountable, may mean that potential entrants need some level of certainty around future recruitment of members before choosing to enter.

b) Generating scale is important to CMB providers due to the very nature of the business. A key feature of CMB providers is the use of a common brand by its members. This is a barrier to entry for de novo entrants but also a potential barrier for potential entrants such as common-ownership groups, who would need to demonstrate to potential pharmacy symbol group members, the benefits of membership. CMB providers need to be able to achieve a level of brand awareness and recognition among end consumers

c) Any growth in the market by existing competitors or new entrants is, due to low levels of switching, likely to need to be based primarily on the recruitment of new independent pharmacies. Due to the relatively limited growth rate in the size of the market, the Commission does not consider it likely this could be timely, likely, and sufficient to prevent an SLC.

d) The evidence on past entry shows that only two providers who were not owned by the Parties have entered since 2012 and the most recent entrant, *Pure*, has only two members. NaviCorp has been a more successful entrant. For example, *CarePlus* was launched in 2015 and reached [redacted] members in 2021.

5.461 The Commission has considered all the factors and the evidence provided by the Parties and third parties and the appropriate weight to attach to same. Accordingly, the Commission's conclusion is that the evidence does not support the view that entry would be timely, likely and sufficient to prevent an SLC. While United Drug may face relatively lower barriers to entry and expansion compared to a other, de novo entrants, the evidence does not support the view that entry by United Drug would be timely, likely and sufficient prevent an SLC.

Constraints from outside the market

5.462 The Commission further assessed the competitive impact of the Proposed Transaction, considering the Parties' arguments on competition from outside the market.

5.463 First, the Parties claimed in the Written Response that

> *"the primary constraint for existing customers is not other CMB providers, but the ability to switch to other business models.*

…

if CMB providers really did face no constraint for existing … then we would expect that CMB providers would be able to price discriminate against these existing customers (i.e. charge higher prices). However, CMB providers do not do this as that would risk them losing those customers to other models."[776]

5.464 In considering the competitive constraint of customers switching to other business models, the Commission notes that, based on Figure 9 from the Frontier Report, switching from CMB has taken place either to common-ownership or to becoming fully independent i.e., self-supply. Self-supply is considered below.

5.465 With regard to common ownership, moving to common-ownership involves either the pharmacy owner selling the pharmacy to a common owner (e.g., selling to Uniphar or *Boots*) or joining a co-operative style model. Both of these options require the pharmacy to give up its independent status entirely, and therefore the option of switching to common ownership should not be viewed as a substitute for CMB services.

5.466 Moving to the claim that *"CMB providers would be able to price discriminate against these existing customers (i.e. charge higher prices)"*:

a) The Commission does not agree with the implication that lack of competitive constraints for existing customers would necessarily lead to price discrimination. Even if CMB providers have the ability to price discriminate, it does not mean they would have the incentive to. The Parties and Frontier have provided no evidence beyond speculation that price discrimination against existing customers is an inevitable result of the lack of competitive constraints facing suppliers for existing customers.

[776] Written Response, paragraphs 8.140-8.141.

b) The Commission notes that there are up-front costs for new customers (re-fit, branding, etc) and also ongoing costs (monthly fees) which all customers pay. It is therefore possible to compete for customers on the basis of attractive offers in relation to up-front offers, which would be entirely consistent how the market works and would not invalidate the Commission's view that competition is primarily for new customers. Rather than price discriminating against existing customers, competition may be expected to be more vigorous around up-front costs and the service offer.

c) The decision for a pharmacy to use CMB services comes with a significant (sunk) up-front cost and changes to the branding of its business. This means that pharmacies are likely to carefully consider current and future costs of CMB membership. Therefore, price discrimination against existing customers may impact upon a CMB provider's ability to recruit new pharmacies.

5.467 In conclusion, the parties have not provided any direct evidence to show that the Commission needs to demonstrate a lack of price discrimination in the market in order to conclude that there are not strong constraints from outside the market which would prevent the Proposed Transaction resulting in an SLC.

5.468 The Commission now considers constraints from self-supply.

Constraints from self-supply

5.469 The Parties said that self-supply was a constraint on providers of CMB services. For example, the Merger Notification Form states:

> *"In addition, pharmacies may source the relevant services from two or more different service providers and/or self-supply. The combined entity would be constrained by the fact that pharmacies can and do self-provide the services it offers, as indicated by the small number of pharmacies in*

the State to which Allcare currently provides services. Individual pharmacies as well as larger pharmacy groups such as Boots, McCabes and Sam McCauley also self-supply. Pharmacies can also use individual providers of the various services offered by Allcare (e.g., accountancy firms etc.) The parties estimate that around [redacted]*% of pharmacies in the State do not purchase (i.e. they self-supply) these services and therefore will not require these services post-transaction, while current purchasers of common management/branding could easily switch to self-supply/sourcing at limited cost and by providing minimal notice to their supplier."*[777]

5.470 The Parties noted that in previous decisions the Commission had acknowledged the competition from self-supply:

> *"Within the specific context of the possible self-supply, or individual supply of the various associated/dis-aggregated services, of common management/branding services to retail pharmacies, the CCPC has made two recent contributions, namely, CCPC (2018) and CCPC (2020). For example, in CCPC (2018, paragraph 57): "… In addition, retail pharmacies can also self-provide the services which Allcare offers or they may use individual providers of the various services offered by Allcare, e.g., accountancy firms, recruitment firms, marketing, etc. … ." See also CCPC (2020, paragraph 90)."*[778]

5.471 NaviCorp said that:

> [redacted]

[777] Merger Notification Form, section 5.3.

[778] Supplementary Economics Report, p. 27. The decisions referred to *are M/18/085 – Uniphar/ Bradley's Pharmacy Group* and *M/20/27 – Uniphar/Hickey's.* See also Written Response, paragraphs 8.165 to 8.166.

[redacted]

[redacted]

[redacted][779]

5.472 As part of its assessment, the Commission reviewed internal documents provided by the Parties. These documents focussed on the competition from other CMB providers, and not on competition from self-supply. For example:

- A 2019 Uniphar document discusses the CMB offers of [redacted].[780]
- A 2020 Uniphar document discussing the *Allcare* recruitment strategy discusses [redacted][781]
- A 2021 Uniphar document compares the Uniphar *Life Pharmacy* and *Allcare* brands with the [redacted][782]

[779] NaviCorp Response to Phase 2 RFI, Q33.

[780] Uniphar document "[redacted]", pp. 10-11, Uniphar Response to Phase 1 RFI.

[781] Uniphar document "[redacted]", p. 5, Uniphar Response to Phase 1 RFI.

[782] Uniphar document "[redacted]", sheet titled "Market Competition", Uniphar Response to Phase 1 RFI.

- A 2021 Uniphar document discusses three year trends in market shares and includes *Allcare*, *Life Pharmacy*, [redacted] as competitors.[783]

- A NaviCorp 2021 document makes a distinction between Corporate Brands (e.g., *Boots*), Indigenous groups (e.g., *McCauley*), Symbol Groups (e.g., *CarePlus*) and Independents.[784]

5.473 The Commission also notes the substantial differences between the CMB offerings and the self-supply option. First, with regard to price, as described above in there are substantial costs involved in joining a CMB provider for an existing pharmacy. Second, the purchase of CMB services also allows the pharmacist to access a wide range of services:

- Territory Manager Support;

- Business reporting;

- Managed back office, including product and price file;

- Regulatory support, including standard operating procedures and PSI compliance;

- Primary Care Reimbursement Service claims support, including analysis and support visits;

- Category management, including store layouts, merchandising support, monthly promotions and point of sale material;

[783] Uniphar document '[redacted], Uniphar Phase 1 RFI.

[784] NaviCorp document "*Irish-Pharmacy-Sector-and-Navi-16Mar21.pptx*", dated 16 March 2021, p. 6, NaviCorp Response to Phase 1 RFI.

- Training, including access to online platforms and training events;
- Digital services, including patient apps and the websites which allow the pharmacies to sell online; and
- Marketing support, including loyalty cards and social media support.[785]

5.474 Finally, the Commission notes that Uniphar's own submissions highlight the importance of CMB services and the problems facing independent pharmacists who may choose to self-supply these services. For example:

> *"Market changes on both domestic and global levels are making it increasingly hard for independent pharmacists to run their businesses profitably. Globally, pharmaceutical manufacturers are under pressure on multiple levels, pressure which is pushed downwards through the value chain to the pharmacist. In Ireland, successive governments have sought to control health spending by reducing pharmacy margins.*
>
> *For single pharmacies or small groups without the buying power or the resources to invest in technology, business intelligence or marketing resources to increase their competitiveness, this has been particularly damaging. As a result, the retail pharmacy market is seeing more and more pharmacy owners choosing to be part of a symbol group that can provide the supports that help them manage their business to ensure that, in a more aggressively competitive market, they are not 'leaving anything on the table', but are optimising their chances of getting a strong return on their investment and making sure they can continue to serve their patients and their community. The goal of all symbol brands is to develop national retail brands for independent pharmacists that sit at the heart of*

[785] Uniphar document "*Symbol Comparison Workings - Allcare , Life & Market.xlsx.XLSX*", Uniphar Response to Phase 1 RFI.

local communities similar to the evolution of the SuperValu, Centra and Spar brands, if one draws analogies from the grocery sector."[786]

"Being part of a recognised national retail brand helps to increase store footfall for independent pharmacies and allows local community pharmacies compete against national and international retail brands in common ownership. As retail pharmacies compete aggressively for patients/consumers, retail brands are investing heavily in national and local community-based marketing campaigns to build brand awareness and ultimately drive footfall into stores. In light of this competition, the symbol brand marketing investment is key to competing against these local market pressures which in the case of a standalone independent or a pharmacy in a buying group is cost prohibitive." [787]

5.475 The evidence above shows that there is competition between CMB providers and that the focus of the CMB providers when monitoring competition is on the competition from other CMB providers, not from self-supply of these services.

5.476 In the Written Response, the Parties stated that:

"The Assessment states that CMB service providers have different offerings than the self-supply option. However, this is simply a list of services that CMB providers offer. The relevant issue is that self-supply includes independent pharmacies employing a combination of providing some of these services themselves and acquiring some from other providers."[788]

5.477 The Commission's view is that the implementation of the Proposed Transaction would remove the constraints imposed on the Uniphar CMB brands (*Allcare* and

[786] Uniphar Response to Phase 2 RFI, Q35.

[787] Uniphar Response to Phase 2 RFI, Q35.

[788] Written Response, paragraphs 8.163 and 8.164. See also paragraph 8.172.4.

Life Pharmacy) by the NaviCorp CMB brands (*CarePlus* and *StayWell*) and *vice versa*. The Commission also observes that there is limited evidence of pharmacies leaving symbol groups to return to being independent pharmacies (as set out above, between 2019 and 2022, [redacted] left Uniphar symbol groups to become independent and a maximum of [redacted] left NaviCorp symbol groups to become independent), meaning that to the extent self-supply is a constraint, it likely constrains providers in their recruitment of pharmacies, but not in their retention. Furthermore, the Commission has seen no evidence that price or service factors have been the cause of pharmacies exiting the market to self-supply.

5.478 While there would be some competition from self-supply, including the ability of retail pharmacists to purchase buying group services along with other services, the evidence available to the Commission does not support the view that this competition, even when combined with the other post-merger competitive constraints, would be sufficient to prevent the implementation of the Proposed Transaction resulting in an SLC.

<u>Indirect constraints</u>

5.479 The Economics Report stated that competition between CMB providers would be supplemented by the competition from downstream retail pharmacy chains:

> *"However, it is not at all clear to this author at least, to what extent these two proposed product markets [CMB and Buying Groups] represent meaningful competition policy (as opposed to commercially meaningful) markets. In particular, even if the supply of such services were controlled by a hypothetical monopolist it seems clear that this monopolist would face a significant level of competition from the (vertically integrated) retail pharmacy chains such as Boots, McCauley's, McCabes as well as many others.*[789]

[789] Economics Report, p. 10, Annex 7.3(a) to the Merger Notification Form. See also p. 18.

5.480 *And:*

> *"In addition, and as previously indicated, it seems clear that the symbol/franchise retail pharmacies as well as the buyer groups face a significant level of competition from (vertically integrated) retail pharmacy chains such as Boots, McCauley's, McCabes as well as many others, who in essence already supply themselves with common management/branding services and buyer group services."*[790]

5.481 The Supplementary Economics Report further discussed this argument:

> *"More generally, it seems useful even at this early stage of the report to highlight the recent evolution of the Irish retail groceries market when considering developments in the Irish retail pharmacy market. In particular, one could think of the common management/branding services (as well as buying groups services) that are provided by the likes of Musgrave and BWG to the likes of SuperValu and EUROSPAR, respectively. This provision of common management/branding service is of course a very meaningful commercial market but if one wanted to think of the grocery sector from an economics of competition policy perspective and particularly so in the context of a proposed merger, say, between SuperValu and EUROSPAR, one would need to always focus attention on the final consumer and hence incorporate the importance of the competitive restraint exerted on SuperValu and EUROSPAR by the vertically integrated retailers such as Dunne Stores and Tesco and by the so-called discounters such as Aldi and Lidl as well as by the other symbol/convenience stores, e.g. Londis and Costcutter, as well as by relevant independents, in that sector, e.g. Morton's of Ranelagh, Dublin 6."*[791]

[790] Economics Report, p. 18, Annex 7.3(a) to the Merger Notification Form.

[791] Supplementary Economics Report, p. 3.

5.482 The Commission finds that this argument regarding the constraints posed by vertically integrated providers on CMB providers relies on downstream competition and, therefore, this should be considered as an indirect constraint.

5.483 Adopting an approach similar to the discussion above in paragraphs 5.226 – 5.238, the Commission has considered the proportion of costs represented by CMB services and the intensity of price competition between downstream suppliers.

Proportion of costs

5.484 There are different methods that can be used to estimate the proportion of retail pharmacists' costs that can be associated with purchasing CMB services. The Commission used three different approaches.

5.485 First, the monthly fee for the *Allcare* CMB service is €[redacted] per month, or €[redacted] per year[792] Research by KPMG estimated the average retail pharmacy costs as €1,455,000.[793] so the €[redacted] would be around [redacted]% of costs.

5.486 Second, Uniphar estimated the costs of joining *Allcare* as €[redacted] fit out costs, €[redacted] if the pharmacy has to switch from the Helix/Touchstone, a €[redacted] one off boarding fee and monthly charges of €[redacted] [794] Uniphar offers a [redacted] pharmacies switching to *Allcare*.[795] Summed over 36 months, these costs come to €[redacted] or €[redacted] per year. This figure would represent around [redacted]% of the costs of the average pharmacy.[796]

[792] Uniphar document '[redacted]', p. 1, Uniphar Response to Phase 1 RFI.

[793] IPU (2021). *Annual Review of Community Pharmacy in Ireland 2020*, p. 28. The Commission has used the national figure.

[794] Uniphar document '[redacted]', p. 1, Uniphar Response to Phase 1 RFI.

[795] Uniphar document '[redacted]', p. 1, Uniphar Response to Phase 1 RFI.

[796] The Commission recognises that not of all of these costs may be variable costs. Some may be fixed costs and changes in fixed costs can be expected to have less of an impact on prices than changes in variable costs. Nevertheless, the Commission has included these costs in order to produce a more conservative and higher estimate of the cost proportion.

5.487 Third, the Commission identified a NaviCorp document where a pharmacy was [redacted].[797] The [redacted][798] Research by KPMG estimated the average retail pharmacy turnover as €1,515,000.[799] [redacted] Adding this to the €[redacted] would give costs of around [redacted] per year. This figure would represent around [redacted]% of the costs of the average pharmacy.

5.488 Consequently, while the costs of CMB services are not insignificant, particularly the refit and branding costs for new customers, they can be reasonably estimated as between [redacted]% (for existing customers) and [redacted]% (in the case of the first year of a new customer). Taking the higher end of this, a 5-10% total price increase would amount to a [redacted]% increase in a retail pharmacists' total costs. The evidence suggests that such a price increase would represent a small proportion of retail pharmacists' costs and this is likely to weaken considerably the impact of any indirect constraints.

5.489 The Parties' Written Response states:

> *"The proportion of costs affected: The Assessment considers the proportion of costs that could be impacted by the CMB services providers, and on the basis on the size of these costs concludes that changes to these costs would be unlikely to impact on downstream competition. However, the proportion of costs is only one part of this equation. What is important to consider is the impact that a change in those costs could have in relation to the retailers' margins as a small change in costs can have a big impact on retailers' margins."*[800]

[797] NaviCorp document "*LIMA_00015462_Exported_Native_File.pdf*", p. 1, NaviCorp Response to Phase 2 RFI.

[798] NaviCorp Response to Phase 2 RFI, Q33(i).

[799] IPU (2021). *Annual Review of Community Pharmacy in Ireland 2020*, p. 27. The Commission has used the national figure.

[800] Written Response, paragraph 8.170.1. See also Frontier Report, paragraph 120.

5.490 The Commission now considers downstream price competition between retail pharmacies.

Price competition between downstream retail pharmacies

5.491 The price sensitivity of consumers, who are the customers of retail pharmacies, was discussed above (see paragraph 5.290). The evidence suggests that retail consumers are unlikely to be price sensitive to the cost of POHPPs and this is likely to weaken considerably the impact of any indirect constraints.

5.492 The Frontier Report states:

> *"Economic theory and the factual matrix suggests that the downstream retail market is very competitive. This is because there are:*
>
> *a) over 1,900 pharmacies in Ireland; b) a high number of pharmacies per capita in Ireland (for example, Ireland has 380 pharmacies per million people compared to the UK's 218 per million27);*
>
> *c) a mixture of business models, i.e. independents, franchised stores and vertically integrated;*
>
> *d) very low concentration, in particular as only about 24% are vertically integrated, and even amongst those the ownership of those chains is very diverse; and*
>
> *e) low barriers to entry into retail pharmacy, as indicated by the average 124 new pharmacies registered per year over the last 5 years."*
>
> *"In particular, the low barriers to entry suggest that if there were positive economic profits made by existing pharmacies, those would attract entry until those economic profits are dissipated. This in turn suggests that the market is competitive."*

Given this intense competition at the retail pharmacy level, CMB pharmacies would be unlikely to be able to pass on any increased prices given they are a small part of the market and constrained by other pharmacies. Rather, they would have to absorb any higher price (or reduced quality) through reduced margins. In a competitive market, this would mean they are earning returns below a normal level and, as such, would be likely to exit the market over time."[801]

5.493 The Commission's view is that competition between retail pharmacies takes place at the local level. [802] Consequently, the aggregate figures provided by Frontier Economics, for example the number of pharmacies per capita and number of new pharmacies opened per year, are relatively uninformative regarding the level of downstream competition between pharmacies.

5.494 Furthermore, internal documents from Uniphar showed that the most important factors when choosing a retail pharmacy are location, past experience, friendliness of staff, relationship with pharmacist, and parking available.[803] Whether a pharmacist is a member of a CMB or not will have little impact on these five factors.

5.495 The Parties' Written Response states:

"As an initial point, indirect constraints do not need to be sufficient in themselves to offset an SLC. They only need to be a meaningful constraint, such that together with other constraints – outlined above – would offset any SLC. Therefore, we consider the Assessment has erred in not taking account of these indirect constraints."[804]

[801] Frontier Report, paragraphs 123 to 125.

[802] See, for example, *M/20/027 – Uniphar/Hickey's*, paragraph 35.

[803] Uniphar document, "*SFRETAILHIGHLIGHTSC21-307 Pharmacy Brand Equity & Market Study 2021 Report Full Report V2.pdf*", dated November 2021, Uniphar Response to Phase 2 RFI.

[804] Written Response, paragraph 8.168.

5.496 The Commission agrees that indirect constraints should be assessed together with other constraints, when coming to a view on whether the implementation of the Proposed Transaction would result in an SLC.

5.497 On the basis of the evidence available, the Commission's view is that there would be some weak competitive constraints from indirect constraints. However, the evidence available to the Commission does not support the view that these constraints, even when combined with the other post-merger constraints, would be sufficient to prevent the implementation of the Proposed Transaction resulting in a substantial lessening of competition.

Impact on wholesaler volumes

5.498 The Supplementary Economics Report discussed the potential impact on wholesaler volumes as follows:

> *"If one restricted attention to the symbol/franchise groups, the competition policy exercise is to imagine Uniphar increasing the prices that they charge to their symbol/franchise group members for common management/branding services significantly after the proposed acquisition….Indeed, such a strategy would have the possible upside of higher revenues but there would still be a number of possible significant downsides…it is noted that Uniphar would also suffer losses from the decreased wholesale throughput."*[805]

5.499 The Commission understands that the view put forward in the Supplementary Economics Report is that one factor which would constrain Uniphar's post-transaction incentives to increase the prices for its CMB services would be that if retail pharmacies responded by switching to alternative CMB providers, such as CommCare, this could result in these pharmacies switching their wholesaler from

[805] Supplementary Economics Report, p. 28.

Uniphar to United Drug. This would result in lower volumes for Uniphar, reducing the profitability of its wholesale division.

5.500 The Parties' Written Response states:

> *"The threat to a CMB service provider such as Uniphar of downstream retail competition is enhanced by the fact that it is also integrated up the supply chain as a wholesaler. As such, its wholesale volumes will reduce if its franchise pharmacies become less competitive and thus reduce their sales, and/or switch away to another business model or CMB service provider. It will therefore lose the upstream wholesale margins associated with the relevant sales. Currently [redacted]% of Uniphar's total wholesale volume comes from the Allcare and Life Pharmacy franchises."*[806]

5.501 The Commission considers that the impact on wholesaler volumes relies on a substantial threat of customers switching CMB providers and strong competition in that market. The theory of harm the Commission is assessing is whether there will be an SLC in the market for the provision of CMB services in the State compared to the counterfactual. The view put forward in the Supplementary Economics report relies upon the threat of switching in that market, which is assessed above in paragraphs 5.289 to 5.296.

5.502 Second, it is possible for retail pharmacies to switch CMB providers without changing wholesaler. This will reduce considerably the impact of this competitive constraint.

5.503 The Parties' Written Response states:

> *"Existing pharmacies' ability to switch purchases: Pharmacies can switch some of their wholesale business away from their CMB service provider, even if they don't switch CMB service providers. The Life and Allcare*

[806] Written Response, paragraph 8.170.3. See also paragraph 8.172.1.

Franchise Agreements each include a minimum order quantity of [redacted]*% of total purchases. The remaining* [redacted]*% may be purchased through alternative sources. Therefore, a pharmacy could switch some of their purchasing away from their CMB provider, even if they do not switch models.*

Pharmacies can switch some or all of their buying group business, even if they don't switch CMB service providers: Uniphar's data shows that this already takes place. Specifically, numerous symbol pharmacies and standalone pharmacies are also LinkUp customers.[807]

5.504 The Commission finds that this argument relates to competition in the provision of wholesale services to retail pharmacies and competition in the provision of buying group services to retail pharmacies. The suggestion that a pharmacy using a CMB could respond to a price increase or poor service in the market for CMB services by moving some small element of its wholesale purchasing to United Drug is not an obvious constraint. It is not clear that a pharmacy would gain any benefit from such an action and therefore the Commission considers that it is unlikely to have a strong incentive to do so.

5.505 On the basis of the evidence available, the Commission's view is that there would be some weak competitive constraints from the potential loss of wholesaler volumes. However, the evidence available to the Commission does not support the view that these constraints, even when combined with the other post-merger constraints, would be sufficient to prevent the implementation of the Proposed Transaction resulting in a substantial lessening of competition.

Overall conclusion for horizontal unilateral effects in the market for the provision of CMB services in the State

[807] Written Response, paragraph 8.172.2 and 8.172.3. See also Frontier Report, paragraphs 102 and 126 to 129 and 161.

5.506 The Commission has considered a number of factors in assessing the theory of harm that the loss of a close competitor in a highly concentrated market for the provision of CMB services will likely result in an increase in prices, a loss in service quality, and/or a loss of innovation to retail pharmacies in the State. These include the high levels of concentration in the market for the provision of CMB services; the closeness of competition between the Parties; the competitive constraint imposed by the NaviCorp brands; barriers to entry and expansion in the market; and constraints from outside the market. The Commission considers that:

a) The effect of the implementation of the Proposed Transaction would be to reduce the number of providers of CMB services from 4 to 3, in a market where the third competitor, *Pure*, has a [0-10]% market share. The market for the supply of CMB services is already highly concentrated, and that on the basis of the evidence available to the Commission, the likely effect of the Proposed Transaction would be to substantially increase concentration. Following the implementation of the Proposed Transaction, Uniphar would have the largest share of the market based on membership numbers ([60-70]% based on 2021 shares). Following completion of the Proposed Transaction, the market structure would be one where the leading two undertakings (Uniphar and CommCare), will collectively have almost the entire market, with the only other remaining competitor having a [0-10]% market share.

b) Uniphar and NaviCorp compete closely in an already concentrated market for the provision of CMB services. Switching between suppliers of CMB services is very uncommon. This may be in part due to the significant initial costs involved in re-fitting and branding a pharmacy when joining a symbol group, and these costs are sunk. Competition in the market therefore takes place at the recruitment stage—competitors do not compete for each other's existing customers, but for pharmacies which do not, at that time, avail of CMB services.

c) CommCare would be, following the implementation of the Proposed Transaction, one of only two remaining competitors of any significant scale. CommCare's existing scale is such that any expansion by CommCare would not be timely, likely, and sufficient to prevent an SLC.

d) Generating scale is important to CMB providers due to the very nature of the business. A key feature of CMB providers is the use of a common brand by its members. This is a barrier to entry but is also likely a barrier to expansion for very small competitors such as *Pure*. CMB providers need to be able to achieve a level of brand awareness and recognition among end consumers

e) Any growth in the market by existing competitors or new entrants is, due to low levels of switching, likely to need to be based primarily on the recruitment of new independent pharmacies. Due to the relatively limited growth rate in the size of the market, the Commission does not consider it likely this could be timely, likely, and sufficient to prevent an SLC.

f) The competitive constraints from outside the market, even when combined with other post-merger competitive constraints, would not be sufficient to prevent a substantial lessening of competition.

5.507 Taking all this into account, the Commission has concluded that the Proposed Transaction will result in an SLC in the market for the provision of CMB services in the State compared to the counterfactual.

5.508 The Commission discusses whether the efficiencies arguments and proposals submitted by the Parties ameliorate the SLC in this market in Sections 8 and 9, respectively.

Conclusions on Unilateral Effects

5.509 For the reasons set out in this section and considering all of the evidence described above, the Commission is of the view that the Proposed Transaction will result in:

- An SLC compared with the counterfactual in the market for the provision of buying group services in the State. Uniphar is likely to have the ability and the incentive to raise prices, reduce discounts passed onto pharmacies, and/or degrade service quality on its own initiative; and,

- An SLC compared with the counterfactual in the market for the provision of CMB services in the State. Uniphar is likely to have the ability and the incentive to raise prices, and/or degrade service quality on its own initiative.

5.510 The Commission discusses whether the efficiencies arguments and proposals submitted by the Parties ameliorate the SLC in these markets in Sections 8 and 9, respectively.

6. COMPETITIVE ASSESSMENT COORDINATED EFFECTS

6.1 Coordinated effects can occur where a proposed transaction changes the nature of competition in the relevant market by making it more likely that the merged entity and some or all of its competitors will coordinate their behaviour by, for example, raising prices and/or decreasing output. Thus, the key questions[808] are whether a proposed transaction would: (i) materially increase the likelihood that firms in the relevant markets would successfully coordinate their behaviour; or (ii) strengthen existing coordination between firms in the relevant market.

6.2 The Commission's view, based on the information reviewed, is that there are no plausible coordinated effects theories of harm. Given the relevant counterfactual, the Commission considered the likelihood of potential coordinated effects resulting from the Proposed Transaction with respect to factors such as market share symmetry, price transparency, product differentiation and market stability. Having assessed these factors, the Commission considers that the Proposed Transaction would not make it more likely that the merged entity and other suppliers of either buying group services or CMB services would engage in coordinated behaviour in the Relevant Markets with the effect of substantially lessening competition in the Relevant Markets. The Parties agreed with the Commission's preliminary view in the Assessment that no plausible coordinated effects theory of harm can be identified.[809]

6.3 Therefore, no further discussion of coordinated effects is carried out for the purposes of assessing the likely effects of the Proposed Transaction in the Relevant Markets.

[808] As set out in paragraph 4.23 of the Merger Guidelines.

[809] Written Response, paragraph 9.1.

7. VERTICAL RELATIONSHIP

7.1 The Commission has identified the following vertical relationships between Uniphar and NaviCorp[810]:

- **Relationship 1: The upstream wholesale supply of POHPPs and the downstream provision of buying group services and/or provision of CMB services**: Uniphar, through Uniphar Wholesale, is one of two full-line wholesaler of POHPPs to retail pharmacies in the State. NaviCorp provides buying group services and CMB services to retail pharmacies in the State. NaviCorp negotiates discounts, supply terms, and service levels with Uniphar for the pharmacies who are members of Axium, including *CarePlus* and *StayWell* members.

- **Relationship 2: The upstream provision of buying group services and/or provision of CMB services, and the operation of retail pharmacies**: NaviCorp provides buying group services to retail pharmacies through Axium. NaviCorp also provides CMB services to retail pharmacies through *CarePlus* and *StayWell*. The Commission understands that Uniphar owns 98 pharmacies which operate under the *Hickey's*, *Allcar*e or *Life Pharmacy* brands. Uniphar has a joint shareholding in one further pharmacy in the State.[811]

7.2 Vertical effects can occur where a Notified Transaction changes the ability and incentives of the parties involved in the transaction, making it more likely that the merged entity will engage in either customer foreclosure or input foreclosure. Thus, the key question for the Commission to consider is whether a Notified Transaction would materially increase the likelihood of customer foreclosure or

[810] Merger Notification Form, paragraph 4.2.

[811] Collis Pharmacy Limited, 350 North Circular Road, Phibsboro, Dublin 7.

input foreclosure due to the merger's effects on the merged entity's ability and incentive to foreclose its upstream and/or downstream competitors.[812]

Relationship 1

Customer Foreclosure

7.3 Following the implementation of the Proposed Transaction, Uniphar will operate the Axium buying group and *StayWell* and *CarePlus* Symbol Groups. This will lead to Uniphar having, per the 2021 data set out in Table 4 in Section 5, [redacted] pharmacies which are members of its three owned buying groups. In addition, as per Table 10 in Section 5, Uniphar will have [redacted] pharmacies which are members of its Symbol Groups. In addition, as noted in paragraph 7.1 above, the Commission understands that Uniphar owns approximately 98 retail pharmacies in the State which operate under the *Hickey's*, *Allcare* or *Life Pharmacy* brands.[813] This results in a total number of Uniphar affiliated retail pharmacies (i.e. retail pharmacies which are either owned by Uniphar, members of a Uniphar buying group or members of Uniphar Symbol Groups) of [redacted] [814] Based on an estimated total number of retail pharmacies in the State of 1,905[815], this means that, following the implementation of the Proposed Transaction Uniphar-affiliated pharmacies would account for [60-70]% of the total number of retail pharmacies.

7.4 United Drug has [redacted] member pharmacies of its buying groups, Pharma le Chéile and Pharmax, [40-50]% of the total number of retail pharmacies in Ireland. The Commission considers that the Proposed Transaction does not increase Uniphar's

[812] See paragraph 5.8 of the Merger Guidelines.

[813] The Commission understands Uniphar may have acquired retail pharmacies following the notification of the Proposed Transaction, and that, as a result, Uniphar may currently own more than 98 retail pharmacies in the State.

[814] This includes Uniphar's buying group members, symbol group members and Uniphar-owned pharmacies.

[815] Pharmaceutical Society of Ireland. (2022). "Pharmacy Statistics: A summary of the pharmacy register", available at Pharmacies_-_Website_Statistics.sflb.ashx (thepsi.ie).

ability or incentive to foreclosure its competitors in the wholesale supply of POHPPs in the State.

7.5 Therefore, the Commission considers that customer foreclosure is unlikely to arise in relation to the wholesale supply of POHPPs following the implementation of the Proposed Transaction.

Input foreclosure

7.6 Following the implementation of the Proposed Transaction, Uniphar's competitors in the Relevant Markets include United Drug, which operates the Pharma Le Chéile and Pharmax buying groups, and CommCare, which operates the IndeGo Plus buying group and the *totalhealth* and *Haven* symbol groups.

7.7 While Uniphar has a very large share of the market for the wholesale supply of POHPPs, it has a strong competitor in United Drug. Furthermore, as part of a vertically integrated business, United Drug's buying groups do not negotiate wholesale supply terms with Uniphar.

7.8 For these reasons, the Commission considers Uniphar does not have the incentive nor the ability to engage in an input foreclosure strategy in relation to the wholesale supply of POHPPs.

7.9 Therefore, the Commission considers that input foreclosure is unlikely to arise in relation to the wholesale supply of POHPPs following the implementation of the Proposed Transaction.

Relationship 2

Customer Foreclosure

7.10 As noted in paragraph 7.1 above, Uniphar owns approximately 98 retail pharmacies in the State, and does not acquire any retail pharmacies as a result of the Proposed Transaction. Furthermore, the Commission understands the Uniphar-owned pharmacies are not members of NaviCorp's buying group or

Symbol Groups. Therefore, the Proposed Transaction does not alter the vertical market structure in relation to Relationship 2 and the Commission considers that customer foreclosure is unlikely to arise in relation to the Relevant Markets following the implementation of the Proposed Transaction.

Input Foreclosure

7.11 By their nature, buying groups and Symbol Groups provide their respective services to retail pharmacies. Uniphar currently operates 98 retail pharmacies out of approximately 1,905 in the State, and is not acquiring any retail pharmacies as part of the Proposed Transaction. Therefore, the Proposed Transaction does not alter the vertical market structure in relation to Relationship 2 and the Commission considers that input foreclosure is unlikely to arise in relation to the Relevant Markets following the implementation of the Proposed Transaction.

Conclusion

7.12 On the basis of the information in the possession of the Commission, no plausible vertical effects theory of harm was identified. Therefore, no further discussion of vertical effects is carried out for the purposes of assessing the likely effects of the Proposed Transaction in the identified Relevant Markets.

7.13 The Parties agreed with the Commission's preliminary view in the Assessment that no plausible vertical effects theory of harm can be identified.[816]

[816] Written Response, paragraph 10.1.

8. EFFICIENCIES

8.1 The Commission has structured its analysis in this section as follows:

(a) The Commission's approach to evaluating efficiencies;

(b) The Parties' submissions with regard to efficiencies;

(c) The Commission's evaluation of the efficiencies arguments submitted by the Parties.

The Commission's approach to evaluating efficiencies

8.2 Paragraphs 8.1 and 8.2 of the Commission's Merger Guidelines state that:

"A merger may generate various efficiencies for the merged entity. The Commission's analysis of efficiencies goes beyond the impact of efficiencies on the merged entity and focuses on whether verifiable efficiencies mitigate adverse competitive effects and prevent an SLC".

"The onus rests on the parties to show that claimed efficiencies are (i) merger-specific, (ii) verifiable and (iii) benefit consumers sufficiently to prevent an SLC".

8.3 Paragraph 8.8 of the Commission's Merger Guidelines further states:

"The evidence provided to the Commission must demonstrate that efficiencies will be of sufficient size and/or scope and will occur in a sufficiently timely fashion to prevent an SLC. The Commission requires that a claimed efficiency meets all three of the following conditions, namely, the efficiency:

(a) is merger-specific, and

(b) is verifiable, and

(c) benefits consumers."

8.4 The Merger Guidelines provide further detail on efficiencies which are considered to be merger-specific and non-merger-specific as follows:

> *"The Commission's analysis of efficiencies distinguishes between efficiencies that are*
>
> *• merger-specific - those that would occur only as a result of the merger and could not be attained by feasible alternative scenarios that raised less serious competition concerns, and*
>
> *• non-merger-specific – those that could practicably occur anyway in the absence of the merger."*[817]

8.5 Paragraphs 8.11 to 8.13 of the Commission's Merger Guidelines discuss the evidence for efficiency claims and state:

> *"The onus rests with the merging parties to provide reliable evidence to show that any efficiencies:*
>
> *(a) are directly achieved by the merger,*
>
> *(b) cannot be achieved by another feasible means less restrictive of competition, and*
>
> *(c) will be achieved within a reasonable timeframe.*
>
> *Verification of efficiency claims requires that the Commission has access to accurate information concerning each of:*
>
> *(a) the nature of the efficiency,*
>
> *(b) whether the efficiency is merger-specific, and*

[817] Commission's Merger Guidelines, paragraph 8.9.

(c) the magnitude, likelihood and timing of the efficiency.

Efficiency claims are necessarily prospective and hence subject to some degree of uncertainty, particularly with respect to dynamic efficiencies claims. It is also likely that most of the information supporting efficiency claims will be in the possession of the merging parties. It is therefore incumbent on the merging parties to provide the Commission with reliable information concerning the likelihood and quantified magnitude of efficiency claims. Vague and speculative claims will not be credited. The Commission may require evidence from various sources including, but not limited to:

• All sources listed in paragraph 1.20[818] *particularly as they relate to efficiencies.*

• Statements by the managers and/or owners of the merging parties to external audiences (including financial markets and regulatory agencies).

• Relevant examples of efficiencies resulting in benefits to consumers."

8.6 Given the competition concerns identified in section 5 above, the Commission also notes paragraph 84 of the EC Merger Guidelines:

"The incentive on the part of the merged entity to pass efficiency gains on to consumers is often related to the existence of competitive pressure from the remaining firms in the market and from potential entry. The greater the possible negative effects on competition, the more the Commission has to be sure that the claimed efficiencies are substantial, likely to be realised, and to be passed on, to a sufficient degree, to the consumer. It is highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of market power, can be

[818] Paragraph 1.20 in the Merger Guidelines lists sources of evidence relevant for merger review.

declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects."

The Parties' submissions with regard to efficiencies

8.7 The Commissions sets out the Parties' views on efficiencies in the different submissions below.

Merger Notification Form

8.8 The Merger Notification Form did not contain any information detailing the efficiencies that would result from the Proposed Transaction. Consequently, the Merger Notification Form did not contain any material which meets the criteria set out in paragraph 8.2 of the Commission's Merger Guidelines.

Uniphar Phase 2 RFI Response

8.9 Question 32 in the Phase 2 RFI to Uniphar asked: "[w]*hat (purchasing) efficiencies, if any, is Uniphar expecting from the Proposed Transaction (e.g., marginal cost reductions)? To what extent will these be passed on to pharmacies that are members of Uniphar's Buying Groups? Provide all supporting Documents with your response."*

8.10 With regard to the purchasing of POHPPs, Uniphar responded that:

"[redacted]

[redacted]"[819]

8.11 With regard to retail support services, Uniphar responded that:

"[redacted]"[820]

8.12 Uniphar also said that it "[redacted]".[821] Uniphar also said it had identified the potential synergies as set out in the table below.

Table 1: Potential synergies identified by Uniphar

Pillar	Today	Focus Area / Efficiencies
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]

[819] Uniphar Response to Phase 2 RFI, Q32.

[820] Uniphar Response to Phase 2 RFI, Q32.

[821] Uniphar Response to Phase 2 RFI, Q32.

[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted] t	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	

Source: Uniphar[822]

8.13 Finally, a Uniphar document estimated synergies in relation to reducing the Axium cost base. It proposed the following cost savings could be achieved:

> ‘[redacted]
>
> [redacted]
>
> [redacted]
>
> [redacted]’’[823]

8.14 Total annual cost reductions were estimated to be €[redacted] if [redacted] retail pharmacies remained with Axium and €[redacted] if [redacted] retail pharmacies remained with Axium.[824] The Commission notes that cost savings resulting from a loss of members are not synergies, so places most weight on the [redacted] retail pharmacies figure.

[822] Uniphar Response to Phase 2 RFI, Q32.

[823] Uniphar document [redacted], dated 12 February 2021, Uniphar Response to Phase 1.

[824] Uniphar document [redacted], dated 12 February 2021, Uniphar Response to Phase 1. To note, estimates within this spreadsheet were in [redacted] However the Commission considers that this is an error as it would require Axium's cost base to be 1,000 times what it is.

8.15 Question 1(xi) of the Phase 2 RFI to Uniphar asked Uniphar to: *"*[p]*rovide copies of all Documents (including those prepared by a third party, whether or not on behalf of Uniphar) prepared during the period from 01 January 2019 to the date of this RFI, which have been received by any member of the board of directors (or equivalent body) or senior management of Uniphar, which consider potential efficiencies in respect of Uniphar Wholesale's delivery of POHPPs that Uniphar expects may arise from the Proposed Transaction."*

8.16 In its narrative response to that question, Uniphar stated:

> *"Uniphar believes that the proposed acquisition of NaviCorp will allow Uniphar to continue to develop its pharmacy solutions proposition to the independent community pharmacy. As a progressive business with a heritage in supporting independent pharmacists, Uniphar aspires to be the go-to solution provider for independent retail pharmacies which want to maintain their independent ownership and autonomy, but avail of the suite of services offered by Uniphar.*
>
> [redacted] *mean that the Proposed Transaction will allow Uniphar to continue to invest in its Irish supply chain and retail business from supply chain infrastructure, support services right through to its digital strategy. By achieving the benefit of a larger volume pool, Uniphar will be able to further leverage its membership buyer power*

vis-à-vis manufacturers and thus enable independent retail pharmacy to compete against the international chains."[825]

"[t]here are significant efficiencies that arise from the transaction. These efficiencies are (i) merger specific; (ii) verifiable; and (iii) benefit consumers sufficiently to prevent any SLC."[826]

8.17 The Parties also stated:

"The efficiencies arise from the combination of complementary assets. The relative strengths of Navi's service proposition can be rolled out rapidly to the pharmacies that are members of Uniphar's buying groups and symbol group propositions. The relative strengths of Uniphar's wholesale integration and symbol group proposition can be rapidly rolled out to members of Navi's symbol group proposition."[827]

8.18 Further detail on these claimed efficiencies are included within the Written Submission, but as these were also discussed in a further submission on efficiencies provided by the Parties on 24 October 2022 (the "Efficiencies Submission"), these will be discussed in the next section.[828]

Efficiencies Submission

8.19 In the Efficiencies Submission, the Parties claimed efficiencies in seven areas:

"[redacted]". ("Efficiency #1")

[825] Uniphar Phase 2 RFI Response, Q 1(xi).

[826] Written Response, paragraph 11.2.

[827] Written Response, paragraph 11.3. In addition to these benefits the Parties highlighted benefits in six areas. These six areas are contained within the seven efficiencies detailed in the Submission on Efficiencies, which is discussed below in paragraphs 8.19 to 8.51.

[828] The Commission notes that p. 27 and p. 29 of the Supplementary Economics Report (which was submitted to the Commission after Uniphar's Phase 2 RFI Response) contains information on potential efficiencies within buying groups and symbol/franchise groups. The Commission notes that this information does not meet the criteria set out in paragraph 8.2 of the Commission's Merger Guidelines.

"[redacted]". ("Efficiency #2")

"[redacted]". ("Efficiency #3")

"[redacted]". ("Efficiency #4")

"[redacted]". ("Efficiency #5")

"[redacted]". ("Efficiency #6")

"[redacted]".[829] ("Efficiency #7")

8.20 For each of these seven efficiencies the Parties set out their reasoning on why the efficiencies were merger specific, verifiable and would benefit consumers.[830] These will each be addressed in the following section.

8.21 The Parties also stated that third parties had identified efficiencies that would result from the Proposed Transaction.[831]

a) The Parties submitted that Menarini stated that the Parties would be able to obtain greater discounts from manufacturers.

[829] Efficiencies Submission, paragraphs 1 to 28. The Parties also discussed efficiencies in the oral submission, p. 60 line 20 to p. 62 line 8 and p. 66 line 4 to p. 71 line 13.

[830] Efficiencies Submission, paragraphs 1 to 28.

[831] Efficiencies Submission, paragraph 29.

b) The Parties submitted that "*A number of manufacturers identified that the Proposed Transaction would result in efficiencies, e.g. as to product recall (as mentioned by Viatris).*"

c) The Parties submitted that Accord and Viatris stated that larger buying groups had the possibility of bringing more stability in the supply chain.

The Commission's evaluation of the efficiencies arguments submitted by the Parties

8.22 In this section the Commission sets out its views on whether the evidence supports the Parties' views that each of the seven merger efficiencies are merger specific, verifiable and would sufficiently benefit consumers to prevent an SLC.

Efficiency #1: [redacted]

The Parties' Views

8.23 The Parties stated the following in relation to this claimed efficiency being merger specific, verifiable and benefitting consumers:

'[redacted]

[redacted].

[redacted]."[832]

Views of the Commission

Is the claimed efficiency merger-specific?

8.24 While the Parties assert that this claimed efficiency cannot be "*replicated through contractual means short of merger*"[833] , the Commission notes that [redacted]. Therefore, the Commission does not consider that this claimed efficiency could only occur as a result of the Proposed Transaction and could not be attained by feasible alternative scenarios that raised less serious competition concerns.[834]

Is the claimed efficiency verifiable?

8.25 The Commission's view is that the Parties' statement regarding the verifiability of this efficiencies does not meet the required standard for verifiability laid out in the Commission's Merger Guidelines. The Commission's Merger Guidelines state that *"[i]t is … incumbent on the merging parties to provide the Commission with reliable information concerning the likelihood and quantified magnitude of efficiency claims. Vague and speculative claims will not be credited."*[835] The Parties

[832] Efficiencies Submission, paragraphs 2-4.

[833] Efficiencies Submission, paragraph 2.

[834] Commission's Merger Guidelines, paragraph 8.9.

[835] Commission's Merger Guidelines, paragraph 8.13.

have not provided reliable information concerning the likelihood and timing of this claimed efficiency.

Will the claimed efficiency sufficiently benefit consumers to prevent an SLC?

8.26 To verify efficiency claims, the Commission requires reliable information concerning the magnitude, likelihood and timing of the efficiency. The Parties have not provided any such information. Furthermore, as the Commission has been unable to conclude that Efficiency #1 is merger-specific or verifiable, it has not been necessary for it to conclude on whether it would benefit consumers, nor on the estimated magnitude of those benefits, if any.

Efficiency #2: [redacted]

The Parties' Views

8.27 The Parties stated the following in relation to this claimed efficiency being merger specific, verifiable and benefitting consumers:

> "[redacted]
>
> [redacted]
>
> [redacted]

[redacted]

[redacted]

[redacted]

[redacted].

[redacted]

[redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted]

[redacted]"[836]

Views of the Commission

Is the claimed efficiency merger-specific?

8.28 The Parties assert that this claimed efficiency cannot be achieved by the Parties individually as it "[redacted]". However, the Parties have provided no further evidence as to the nature of that requirement, and therefore the Commission is unable to verify the merger-specificity of the claimed efficiency, specifically whether the claimed efficiency could only occur as a result of the Proposed Transaction and could not be attained by feasible alternative scenarios that raised less serious competition concerns.[837]

Is the claimed efficiency verifiable?

8.29 The Commission's view is that the Parties' statement regarding the verifiability of this claimed efficiency does not meet the required standard for verifiability laid out in the Commission's Merger Guidelines. The Commission's Merger Guidelines state that *"[i]t is … incumbent on the merging parties to provide the Commission with reliable information concerning the likelihood and quantified magnitude of efficiency claims. Vague and speculative claims will not be credited."*[838] The Parties have not provided reliable information concerning the likelihood and timing of the claimed efficiency.

Will the claimed efficiency sufficiently benefit consumers to prevent an SLC?

[836] Efficiencies Submission, paragraphs 6-8.

[837] Commission's Merger Guidelines, paragraph 8.9.

[838] Commission's Merger Guidelines, paragraph 8.13.

8.30 To verify efficiency claims, the Commission requires reliable information concerning the magnitude, likelihood and timing of the efficiency. While details regarding the nature of the claimed efficiency have been provided in the quote above, the Parties have not provided any information concerning its magnitude, likelihood or timing. Furthermore, as the Commission has been unable to verify that Efficiency #2 is merger-specific or verifiable, it has not been necessary for it to conclude on whether it would benefit consumers, nor on the estimated magnitude of those benefits, if any.

Efficiency #3: [redacted]

The Parties' Views

8.31 The Parties stated the following in relation to this claimed efficiency being merger specific, verifiable and benefitting consumers:

> '[redacted]
>
> [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted][839]

Views of the Commission

<u>Is the claimed efficiency merger-specific?</u>

8.32 While the Parties assert that this claimed efficiency cannot be "*replicated absent the merger*"[840] , the Commission notes that [redacted] Therefore, the Commission does not consider that this claimed efficiency could only occur as a result of the Proposed Transaction and could not be attained by feasible alternative scenarios that raised less serious competition concerns.[841]

<u>Is the claimed efficiency verifiable?</u>

[839] Efficiencies Submission, paragraphs 10-12.

[840] Efficiencies Submission, paragraph 10.

[841] Commission's Merger Guidelines, paragraph 8.9.

8.33 The Commission's view is that the Parties' statement regarding the verifiability of this claimed efficiency does not meet the required standard for verifiability laid out in the Commission's Merger Guidelines. The Commission's Merger Guidelines state that *"[i]t is … incumbent on the merging parties to provide the Commission with reliable information concerning the likelihood and quantified magnitude of efficiency claims. Vague and speculative claims will not be credited."*[842] The Parties have not provided reliable information concerning the likelihood and timing of this claimed efficiency.

<u>Will the claimed efficiency sufficiently benefit consumers to prevent an SLC?</u>

8.34 To verify efficiency claims, the Commission requires reliable information concerning the magnitude, likelihood and timing of the efficiency. While details regarding the nature of the claimed efficiency have been provided in the quote above, the Parties have not provided any information concerning its magnitude, likelihood or timing. Furthermore, as the Commission has been unable to verify that Efficiency #3 is merger-specific or verifiable, it has not been necessary for it to conclude on whether it would benefit consumers, nor on the estimated magnitude of those benefits, if any.

Efficiency #4: [redacted]

The Parties' Views

8.35 The Parties stated the following in relation to this claimed efficiency being merger specific, verifiable and benefitting consumers:

[redacted]

[842] Commission's Merger Guidelines, paragraph 8.13.

[redacted]

[redacted]

[redacted]

- [redacted]

- [redacted]

- [redacted][843]

Views of the Commission

<u>Is the claimed efficiency merger-specific?</u>

[843] Efficiencies Submission, paragraphs 14-16.

8.36 While the Parties assert that this claimed efficiency cannot be "*replicated absent the merger*"[844], the Commission notes that Uniphar developed its [redacted] Therefore, the Commission does not consider that this claimed efficiency could only occur as a result of the Proposed Transaction and could not be attained by feasible alternative scenarios that raised less serious competition concerns.[845]

Is the claimed efficiency verifiable?

8.37 The Commission's view is that the Parties' statement regarding the verifiability of this claimed efficiency does not meet the required standard for verifiability laid out in the Commission's Merger Guidelines. The Commission's Merger Guidelines state that *"[i]t is … incumbent on the merging parties to provide the Commission with reliable information concerning the likelihood and quantified magnitude of efficiency claims. Vague and speculative claims will not be credited."*[846] The Parties have not provided reliable information concerning the likelihood and timing of the claimed efficiency.

Will the efficiency sufficiently benefit consumers to prevent an SLC?

8.38 To verify efficiency claims, the Commission requires reliable information concerning the magnitude, likelihood and timing of the efficiency. While details regarding the nature of the claimed efficiency have been provided in the quote above, the Parties have not provided any information concerning its magnitude, likelihood or timing. Furthermore, as the Commission has been unable to verify that Efficiency #4 is merger-specific or verifiable, it has not been necessary for it to conclude on whether it would benefit consumers, nor on the estimated magnitude of those benefits, if any.

[844] Efficiencies Submission, paragraph 14.

[845] Commission's Merger Guidelines, paragraph 8.9.

[846] Commission's Merger Guidelines, paragraph 8.13.

Efficiency #5: [redacted]

The Parties' Views

8.39 The Parties stated the following in relation to this claimed efficiency being merger specific, verifiable and benefitting consumers:

> '[redacted]

> [redacted][847]

Views of the Commission

Is the claimed efficiency merger-specific?

8.40 The Parties assert that this claimed efficiency cannot be achieved by the Parties individually as '[redacted] However, the Parties have provided no further evidence as to the nature of that requirement, and therefore the Commission is unable to conclude on the merger-specificity of the claimed efficiency, specifically whether the claimed efficiency could only occur as a result of the Proposed Transaction and could not be attained by feasible alternative scenarios that raised less serious competition concerns.[848]

Is the claimed efficiency verifiable?

8.41 The Commission's view is that the Parties' statement regarding the verifiability of this claimed efficiency does not meet the required standard for verifiability laid out in the Commission's Merger Guidelines. The Commission's Merger Guidelines state that *"[i]t is … incumbent on the merging parties to provide the Commission with reliable information concerning the likelihood and quantified magnitude of efficiency claims. Vague and speculative claims will not be credited."*[849] The Parties have not provided reliable information concerning the likelihood and timing of the claimed efficiency.

[847] Efficiencies Submission, paragraphs 18-20.

[848] Commission's Merger Guidelines, paragraph 8.9.

[849] Commission's Merger Guidelines, paragraph 8.13.

Will the claimed efficiency sufficiently benefit consumers to prevent an SLC?

8.42 To verify efficiency claims, the Commission requires reliable information concerning the magnitude, likelihood and timing of the efficiency. While details regarding the nature of the claimed efficiency have been provided in the quote above, the Parties have not provided any information concerning its magnitude, likelihood or timing. Furthermore, as the Commission has been unable to verify that Efficiency #5 is merger-specific or verifiable, it has not been necessary for it to conclude on whether it would benefit consumers, nor on the estimated magnitude of those benefits, if any.

Efficiency #6: [redacted]

The Parties' Views

8.43 The Parties stated the following in relation to this claimed efficiency being merger specific, verifiable and benefitting consumers:

> '[redacted]

[redacted]

[redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

Views of the Commission

Is the claimed efficiency merger-specific?

8.44 While the Parties assert that this claimed efficiency cannot be "*replicated absent the merger*"[851], the Commission notes that [redacted] Therefore, the Commission does not consider that this claimed efficiency could only occur as a result of the Proposed Transaction and could not be attained by feasible alternative scenarios that raised less serious competition concerns.[852]

Is the claimed efficiency verifiable?

[850] Efficiencies Submission, paragraphs 22-24.

[851] Efficiencies Submission, paragraph 22.

[852] Commission's Merger Guidelines, paragraph 8.9.

8.45 The Commission's view is that the Parties' statement regarding the verifiability of this claimed efficiency does not meet the required standard for verifiability laid out in the Commission's Merger Guidelines. The Commission's Merger Guidelines state that *"[i]t is … incumbent on the merging parties to provide the Commission with reliable information concerning the likelihood and quantified magnitude of efficiency claims. Vague and speculative claims will not be credited."*[853] The Parties have not provided reliable information concerning the likelihood and timing of the claimed efficiency.

<u>Will the claimed efficiency sufficiently benefit consumers to prevent an SLC?</u>

8.46 To verify efficiency claims, the Commission requires reliable information concerning the magnitude, likelihood and timing of the efficiency. While details regarding the nature of the claimed efficiency have been provided in the quote above, the Parties have not provided any information concerning its magnitude, likelihood or timing. Furthermore, as the Commission has been unable to verify that Efficiency #6 is merger-specific or verifiable, it has not been necessary for it to conclude on whether it would benefit consumers, nor on the estimated magnitude of those benefits, if any.

Efficiency #7: [redacted]

The Parties' Views

8.47 The Parties stated the following in relation to this claimed efficiency being merger specific, verifiable and benefitting consumers:

[redacted]

[853] Commission's Merger Guidelines, paragraph 8.13.

[redacted]

[redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted][854]

Views of the Commission

Is the claimed efficiency merger-specific?

8.48 The Parties assert that this claimed efficiency cannot be achieved by the Parties individually '[redacted]

[854] Efficiencies Submission, paragraphs 26-28.

[redacted]" and [redacted]."

However, the Parties have provided no further evidence as to the specific nature of those two issues, and therefore the Commission is unable to conclude on the merger-specificity of the claimed efficiency, specifically whether the claimed efficiency could only occur as a result of the Proposed Transaction and could not be attained by feasible alternative scenarios that raised less serious competition concerns.[855]

Is the claimed efficiency verifiable?

8.49 The Parties have provided claims of the specific magnitude and nature of the claimed efficiency. However, the Commission notes that the [redacted]

Will the claimed efficiency sufficiently benefit consumers to prevent an SLC?

8.50 To verify efficiency claims, the Commission requires reliable information concerning the magnitude, likelihood and timing of the efficiency. The Parties have not provided any information concerning how this claimed efficiency would mitigate any adverse competition effects and prevent an SLC in the Relevant Markets. Furthermore, as the Commission has been unable to verify that Efficiency #7 is merger-specific or verifiable, it has not been necessary for it to conclude on whether it would benefit consumers, nor on the estimated magnitude of those benefits, if any.

[855] Commission's Merger Guidelines, paragraph 8.9.

[856] Commission's Merger Guidelines, paragraph 8.4.

Conclusion

8.51 Paragraph 8.8 of the Commission's Merger Guidelines sets out that the Commission requires all three conditions (merger specific, verifiable and benefits consumers) to be fulfilled in relation to efficiencies claimed by parties to a Notified Transaction. The Commission concludes that none of the seven claimed efficiencies meet all three criteria. Therefore, the Commission concludes that the claimed efficiencies do not mitigate the adverse competitive effects resulting from the Proposed Transaction and prevent an SLC.

9. REMEDIES TO AMELIORATE SLC CONCERNS

Introduction

9.1 The Commission has structured its analysis in this section as follows:

(a) The Commission's approach to evaluating proposals;

(b) The first draft proposals and the Commission's evaluation;

(c) The second draft proposals and revised second draft proposals;

(d) The Commission's evaluation of the revised second draft proposals[857];

(e) The updated second draft proposals and the Commission's evaluation;

(f) The third draft proposals;

(g) Conclusion.

The Commission's approach to evaluating proposals

9.2 Parties to a Notified Transaction may enter into discussions with the Commission pursuant to subsection 20(1)(b) of the Act with a view to identifying measures which would ameliorate the effects of the Notified Transaction on competition in any relevant market(s).

9.3 The Act provides that:

> *"In the course of the [Commission's] activities under subsection (1)(b), any of the undertakings involved in the merger or acquisition concerned may submit to the [Commission] proposals of the kind mentioned in subsection (4) with a view to the proposals becoming binding on it or them if the*

[857] The views of the Parties were included in the second draft proposals. However, as the revised second draft proposals were the same as the second draft proposals (with the exception of the removal of the alternate option from remedy package 2), the views of the Parties included in the second draft proposals have been taken into account by the Commission in the evaluation of the revised second draft proposals.

[Commission] takes the proposals into account and states in writing that the proposals form the basis or part of the basis of its determination under section 21 or 22 in relation to the merger or acquisition."[858]

"The proposals referred to in subsection (3) are proposals with regard to the manner in which the merger or acquisition may be put into effect or to the taking, in relation to the merger or acquisition, of any other measures referred to in subsection (1)(b)."[859]

9.4 In relation to when parties may enter into discussions with, and make proposals to, the Commission during the course of a Phase 1 investigation, the Mergers and Acquisitions Procedures states the following:

"Before the expiry of 30 working days after the appropriate date (as defined in section 19(6)13 of the Act), the Commission may enter into discussions and the undertakings involved may make proposals to the Commission with regard to the manner in which the merger or acquisition may be put into effect or to the taking, in relation to the merger or acquisition, of any other measures which would ameliorate any effects of the merger or acquisition on competition."[860]

9.5 In relation to when parties may enter into discussions with, and make proposals to, the Commission during the course of a Phase 2 investigation, the Mergers and Acquisitions Procedures states the following:

"During the Phase Two review period, but no later than 15 working days after the furnishing of the Assessment, the Commission may enter into discussions and the undertakings involved may make proposals to the Commission with regard to the manner in which the merger or acquisition

[858] Subsection 20(3) of Act.

[859] Subsection 20(4) of the Act.

[860] Mergers and Acquisitions Procedures, paragraph 2.10.

may be put into effect or to the taking, in relation to the merger or acquisition, of any other measures which would ameliorate any effects of the merger or acquisition on competition. In exceptional circumstances, the Commission may accept such proposals from the undertakings involved after the expiry of the time limit for their submission set out above in this paragraph 3.14."[861]

9.6 In assessing proposals submitted to the Commission pursuant to subsection 20(3) of the Act, the Commission has regard to the Act and its Mergers and Acquisitions Procedures. The Commission also takes into account the analytical framework set out in the European Commission's Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 ("EC Remedies Notice").[862]

9.7 The EC Remedies Notice sets out the following as a basic condition for acceptable commitments/proposals:

"Under the Merger Regulation, the Commission only has power to accept commitments that are deemed capable of rendering the concentration compatible with the common market so that they will prevent a significant impediment of effective competition. The commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view. Furthermore, commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled."[863]

[861] Mergers and Acquisitions Procedures, paragraph 3.14.

[862] Commission Notice on Remedies Acceptable under Council Regulation (EC) no 139/2004 and under Commission Regulation (EC) no 802/2004.

[863] EC Remedies Notice, paragraph 9.

9.8 In assessing whether the proposed commitments/proposals will likely eliminate the competition concerns identified, the EC Remedies Notice continues:

> *"the* [European] *Commission will consider all relevant factors relating to the proposed remedy itself, including, inter alia, the type, scale and scope of the remedy proposed, judged by reference to the structure and particular characteristics of the market in which the competition concerns arise, including the position of the parties and other players on the market."*[864]

The First Draft Proposals and the Commission's Evaluation

Content of the First Draft Proposals

9.9 On 3 October 2022, the Parties submitted the first draft proposals to the Commission, which was within the required timeframe of no later than 15 working days of the Commission furnishing the Assessment to the Parties (the "First Draft Proposals").[865] In summary, the First Draft Proposals included the following:

a) Buying Group Services - Proposed Remedy

(i) [redacted];

(ii) [redacted]

(iii) [redacted]

[864] EC Remedies Notice, paragraph 12.

[865] Mergers and Acquisitions Procedures, paragraph 3.14.

(iv) [redacted]

(v) [redacted] and

(vi) [redacted]

b) CMB Services - Proposed Remedy

(i) [redacted]

(ii) [redacted]

(iii) [redacted];

(iv) [redacted]

(v) [redacted].

Views of the Parties

9.10 The Parties stated in the First Draft Proposals that:

[866] In the First Draft Proposals, the Parties stated that: "*Uniphar considers that a term of two years is appropriate for these remedies*".

"Uniphar is anxious to complete the Proposed Transaction as soon as possible in order to capture the efficiencies created by the Proposed Transaction and so enhance its offering to retail pharmacies ([redacted]*. Notwithstanding Uniphar's view that the Proposed Transaction is pro-competitive and creates efficiencies, as set out above, Uniphar has considered the preliminary view of the Commission as set out in the Assessment carefully. Uniphar would like to propose a number of remedies which it believes will address any risk the Commission may perceive as arising from the Proposed Transaction."*

9.11 In the First Draft Proposals, the Parties stated further that:

[redacted]

- *the highly dynamic and rapidly evolving POHPP market, with branded products coming off patent; and growth in generic and high tech products;*
- [redacted]*."*[867]

9.12 The Parties also included a presentation on the First Draft Proposals in their Oral Response to the Commission on 18 October 2022.

[867] First Draft Proposals, pp. 2 – 3.

Evaluation of the First Draft Proposals

9.13 On 11 October 2022, the Commission sent questions to the Parties to obtain clarifications on a number of elements of the First Draft Proposals. The Parties responded to these questions on 24 October 2022.

9.14 Following consideration of the First Draft Proposals and the responses to the Commission's questions, it was concluded that the First Draft Proposals would not address the SLC concerns identified by the Commission in the Relevant Markets for a number of reasons, including the following: they do not ameliorate the SLC concerns; they are not comprehensive or effective; [redacted] means that any competition benefit is temporary and time-limited.

9.15 In a meeting with the Parties on 2 November 2022, the Parties were informed of the rejection of the First Draft Proposals on the basis of the above reasons.

The Second Draft Proposals and Revised Second Draft Proposals

Content of the Second Draft Proposals

9.16 On 8 November 2022, the Parties submitted new draft proposals to the Commission (the "Second Draft Proposals"). This was 34 working days after the Commission issued the Assessment. On 11 November 2022, the Commission informed the Parties that the Second Draft Proposals were "*not sufficiently clear, precise or certain to market test. In order to determine whether the proposals can be market tested, the Commission requires further information and/or clarification*".[868] In addition, the Commission sent questions to the Parties to obtain further information and clarification on a number of elements of the Second Draft Proposals. On 14 November 2022, the Parties submitted responses to the Commission's questions, which included a list of 23 entities they identified

[868] Email from the Commission to the Parties of 11 November 2022, at 14:27.

as prospective purchasers of the remedy packages contained in the Second Draft Proposals.

9.17 The Second Draft Proposals contained two remedy packages. However, the second remedy package contained two alternate remedies. In this regard, the Parties stated:

> *"If the Commission considers it appropriate, these alternative approaches could be market tested with prospective entrants / expanders. Each of the two approaches have differing commercial risks and costs for Uniphar and therefore Uniphar would propose to include one of the approaches in the Commitments. Uniphar is agnostic as to which approach is preferred and is happy to offer whichever is deemed the most commercially attractive to entrants and expanders following the Commission's market testing."*[869]

9.18 The Parties were provided with feedback on 16 November 2022 in relation to the Second Draft Proposals and were informed that in order for the Commission to assess and market test proposals, "*clarity and certainty on what constitutes proposals is required*."[870] Further, the Parties were requested to clarify which alternate in the second remedy package was being submitted to the Commission. The Parties submitted a non-confidential version of the Second Draft Proposals which did not include alternate options on 17 November 2022 for the purposes of market testing (the "Revised Second Draft Proposals").

9.19 The Revised Second Draft Proposals included two remedy packages, remedy package 1 and remedy package 2, as follows:

> ***"Remedy Package 1:*** [redacted]

[869] Second Draft Proposals, p. 4.

[870] Email from the Commission to the Parties of 16 November 2022, at 15:03.

Uniphar would agree to [redacted] *on commercial terms.*

Uniphar would provide, [redacted] *a* [redacted]

Uniphar would also offer to the [redacted] *on an optional basis:*

1. [redacted]
2. [redacted]
3. [redacted]
4. [redacted]

[871] Revised Second Draft Proposals, p. 1.

"[redacted]

[redacted]

[redacted]

9.20 On 17 November 2022, in relation to the list of prospective purchasers submitted on 14 November 2022, the Parties stated:

> *"Since submitting [the prospective purchaser] list, Uniphar has reviewed it to ensure all parties on it are fully credible prospective purchasers and also* [redacted] *Uniphar would like to remove* [redacted] *from the list."*[873]

Views of the Parties

[872] Revised Second Draft Proposals, p. 2.

[873] Email from William Fry to CCPC of 17 November 2022 at 15:56.

9.21 In submitting the Second Draft Proposals[874], the Parties stated that:

> *"Notwithstanding Uniphar's view that the Proposed Transaction is pro-competitive and creates efficiencies, as set out above, Uniphar would like to propose the [following]* [redacted] *to address any risk the Commission may perceive as arising from the Proposed Transaction. These proposed remedies will further enhance the competitive outcome of the Proposed Transaction."*[875]

9.22 With regard to Remedy Package 1, the Parties stated that it would achieve the following:

> ***"Eliminates perceived competition concerns*** *in respect of buying group and CMB services entirely because it is structural and* [redacted] *This could be attractive to a prospective symbol group entrant within the pharmacy sector or indeed within the grocery retail sector; it could also be attractive to a prospective entrant to buying group services which wishes to operate on a silent symbol basis;*
>
> ***Is comprehensive and effective from all points of view****, as it addresses concerns put forth by the Commission in the Assessment as to perceived barriers to entry in the market for CMB services. The Commission states: "An important barrier is the value of a recognised brand and therefore the need for scale in terms of the number of pharmacies within the Symbol Group […]"*

[874] The views of the Parties were included in the Second Draft Proposals. However, as the Revised Second Draft Proposals were the same as the Second Draft Proposals (with the exception of the removal of the alternate option from Remedy Package 2), the views of the Parties included in the Second Draft Proposals have been taken into account by the Commission in the evaluation of the Revised Second Draft Proposals.

[875] Second Draft Proposals, p. 3.

The [redacted] *of the* [redacted] *removes both of these barriers and also provides the acquirer with all requirements to operate a commercial buying group in the State; and*

[redacted]"[876]

9.23 With regard to Remedy Package 2, the Parties stated that it would achieve the following:

*"**Eliminate perceived competition concerns** in respect of buying group services entirely because they remove the barriers to entry identified by the Commission in its Assessment regarding technology and access to the Wholesale Supply Agreement.*

***Are comprehensive and effective from all points of view,** as in removing the perceived barriers to entry of the technology and the need for a full-line wholesale agreement, the proposals facilitate entry and/or expansion;*

***Are capable of being implemented effectively within a short period of time**, as they can be offered immediately upon completion of the Proposed Transaction.* [redacted]"[877]

[876] Second Draft Proposals, p. 4.

[877] Second Draft Proposals, p. 6.

Market testing the Revised Second Draft Proposals

9.24 Over the period from 23 November 2022 to 6 December 2022, the Commission market tested the Revised Second Draft Proposals in order to help establish whether they were likely to be appropriate, proportionate and effective in ameliorating the identified SLC concerns in the Relevant Markets.[878] Market testing takes into account the views of market participants. However, market testing forms one facet of the Commission's overall analysis of proposals. Market testing is not determinative in its own right, but is an important perspective through which the Commission evaluates proposed remedies. The Commission can and does consider factors beyond views expressed during market testing in determining whether proposed remedies are appropriate, proportionate, and effective in addressing the Commission's SLC concerns.[879]

9.25 For the avoidance of doubt, market testing of any proposals received by the Commission does not imply that the proposals ameliorate the identified competition effects of a Notified Transaction. [redacted] is not sufficient in and of itself – the competition effects regarding a Notified Transaction should be ameliorated.

9.26 The Commission contacted all of the 21 remaining prospective purchasers of the Remedy Packages who had been identified by the Parties. The prospective purchasers were sent a copy of the Revised Second Draft Proposals, as well as background material prepared by the Commission and a list of questions to be covered in the market testing interview.

9.27 Five of those contacted by the Commission declined an interview, with most of these noting that they had no interest in considering the Remedy Packages because they were irrelevant for their business. Six did not respond, and did not

[878] *M/21/021 – Bank of Ireland/Certain Assets of KBC*, paragraph 6.334; *M/21/004 – AIB/BOI/PTSB - Synch Payments JV*, paragraph 6.13.

[879] *M/21/021 – Bank of Ireland/Certain Assets of KBC*, footnote 634.

respond to follow-up communication. The remaining nine respondents were interviewed by the Commission.

9.28 The Parties were provided with non-confidential call notes of all interviews as soon as non-confidential call notes were agreed with the interviewees. The Parties were provided with regular updates from the Commission on progress with the market testing, and on the timeframes within which they could expect to receive the non-confidential call notes.

9.29 Five interviewees indicated a degree of interest in the [redacted] of one or both of the Remedy Packages.[880] All five noted that their responses were subject to more detail being provided, particularly on the financial side of any transaction. For example, one interviewee listed "[redacted]"[881] These five interviewees answered questions on both Remedy Packages, with one interviewee suggesting that *"the packages are intertwined."*[882]

9.30 With regard to Remedy Package 1, the five interviewees referred to in paragraph 9.29 above all believed that they would, in principle, be able to provide [redacted]. Three of the

[880] These were: [redacted], [redacted], [redacted], [redacted], and [redacted]

[881] [redacted] Call Note Non-confidential Summary, dated 28 November 2022, p. 3, saved as 2022.11.28 CCPC Call with [redacted] - final non confidential.pdf.

[882] [redacted] Call Note Non-confidential Summary, dated 28 November 2022, p. 1, saved as 2022.11.28 CCPC Call with [redacted] - final non confidential.pdf.

interviewees considered the "optional" services included in Remedy Package 1 to be essential, with the other two indicating that they may wish to consider them.

9.31 A number of concerns about Remedy Package 1 were raised by interviewees. One interviewee questioned the time limits of the remedy package and noted that "*the remedy packages are time limited…what happens once those time limits have passed*."[883] In answering whether Remedy Package 1 would be sufficient to enter and grow in the CMB market, one interviewee stated that *"it is unsure if the package would make a huge impact."*[884]

9.32 Interviewees expressed concerns about the ability to compete against groups owned by Uniphar and United Drug. One interviewee commented that "*it would be tough to set up its own platform to compete with Uniphar and United Drug, given their resources*" and "*would need comfort that he would not be going up against the two wholesalers.*"[885] Another interviewee commented that "*one concern they would have is how big Uniphar and United Drug are and whether they would grow to a scale fast enough where they would be taken seriously"* and *"being in the third position in the market is a difficult place to be"*.[886]

9.33 One interviewee questioned whether Remedy Package 1 would be sufficient to allow an acquirer to enter and grow in the buying group market, noting that *"the buying group market is more competitive given the wholesalers and their role in the sector…it would be tough to enter the buying group market, and ... you would*

[883] [redacted] Call Note Non-confidential Summary, dated 28 November 2022, p. 1, saved as 2022.11.28 CCPC Call with [redacted] - final non confidential.pdf.

[884] [redacted] Call Note Non-confidential Summary, dated 2 December, p. 2, saved as 2022.12.02 Call with [redacted] RESPONSE.pdf.

[885] [redacted] Call Note Non-confidential Summary, dated 28 November 2022, p. 1 and p. 3, saved as 2022.11.28 CCPC Call with [redacted] - final non confidential.pdf.

[886] [redacted] Call Note Non-confidential Summary, dated 6 December 2022, p. 1 and p. 3, saved as 2022.12.07 Call with [redacted] pdf.

not get the same terms for [redacted] *…it would be tougher in the buying group market and a longer term investment."*[887]

9.34 With regard to Remedy Package 2, the five interviewees referred to in paragraph 9.29 above all believed that they would, in principle, be able to provide buying group services. Interviewees generally viewed the provision of buying group services as a longer term commitment, with one suggesting that he would *"start with Remedy Package 1 and then work towards improving a buying group service offering."*[888] This interviewee also stated that, in relation to Remedy Package 1 more generally, "*he wasn't sure* [redacted] *was viable as it stands, but given his own experience of growing in the industry, it* [redacted]".[889]

9.35 One interviewee viewed the acquisition of Remedy Package 2 as a means of updating their in-house technology which is available within their common ownership group, as '[redacted]."[890] One interviewee stated that they would have the ability to offer buying group services but "*going up against United Drug and Uniphar, the third player would have to be quite substantial*".[891]

9.36 Four interviewees expressed no interest in purchasing the Remedy Packages. One of these interviewees is active in the State but has no pharmacy business and has

[887] [redacted] Call Note Non-confidential Summary, dated 28 November 2022, p. 2, saved as 2022.11.28 CCPC Call with [redacted] - final non confidential.pdf.

[888] [redacted] Call Note Non-confidential Summary, dated 28 November 2022, p. 2, saved as 2022.11.28_Call_with [redacted] _as_amended_by_ [redacted] _final.pdf2.

[889] [redacted] Call Note Non-confidential Summary, dated 28 November 2022, p. 2, saved as 2022.11.28_Call_with [redacted] _as_amended_by_ [redacted] _final.pdf2.

[890] [redacted] Call Note Non-confidential Summary, dated 2 December, p. 3, saved as 2022.12.02 Call with [redacted] RESPONSE.pdf.

[891] [redacted] Call Note Non-confidential Summary, dated 6 December 2022, p. 3, saved as 2022.12.07 Call with [redacted] pdf.

no intention to enter this sector.[892] A second interviewee is based in the UK and has no intention to enter the State.[893] The remaining two interviewees raised a number of issues with respect to the Revised Second Draft Proposals. Both questioned the value of the Remedy Packages, noting that in the case of Remedy Package 1 "[redacted]…. [redacted] *it is hard to see what would you be purchasing.*"[894] Both raised the issue of scale, "[redacted]."[895][896]

9.37 One interviewee stated that *"the remedy packages did not remove the barriers to entry to a new entrant to this market…as the offered remedies do not constitute* [redacted]*…the proposed transaction will increase market concentration."*[897] This interviewee, who has previously considered market entry, commented that *"as a new entrant to the pharmaceutical market in Ireland it would need to bring in additional expertise and knowledge to manage the supply of products and marketing service to a small chain of pharmaceutical outlets"* and

[892] [redacted] Call Note Non-confidential Summary, dated 28 November 2022, saved as "2022.11.28 Call with [redacted] pdf".

[893] [redacted] Call Note Non-confidential Summary, dated 29 November 2022, saved as "2022.11.29 Call note with [redacted].pdf".

[894] [redacted] Call Note, dated 16 November 2022, p. 1, saved as "2022.11.16 Call with [redacted] - with [redacted] s revisions.pdf".

[895] [redacted] Call Note, dated 16 November 2022, p. 1, saved as "2022.11.16 Call with [redacted] with [redacted] s revisions.pdf".

[896] The Parties queried the accuracy of interviewees' views as reflected in call notes. The Commission has taken the Parties' comments into account in its assessment of the call notes.

[897] [redacted] Call Note Non-Confidential Summary, dated December 5 December, p. 2, saved as "2022.12.05 [redacted] call V2 [redacted] revisions.pdf".

that "*they did not see where this human resource would be provided in the remedy packages proposed..*"[898]

9.38 With respect to Remedy Package 2, one of the interviewees who was not interested in the Remedy Packages queried why *"a purchaser would want to buy the* [redacted] *knowing that everyone else that wants it has it too."*[899]

9.39 Finally, one interviewee stated that *"these remedies don't mitigate anything about the proposed transaction."*[900]

The Commission's Evaluation of the Revised Second Draft Proposals

9.40 In assessing the Revised Second Draft Proposals, the Commission has taken into account the results of the market testing as set out above, in conjunction with the submissions of the Parties contained in the Second Draft Proposals and further submissions made by the Parties. As set out in paragraphs 9.2 to 9.8, the Commission's evaluation of proposals considers the extent to which proposals submitted by the Parties ameliorate the effects of the Proposed Transaction on the Relevant Markets. As part of this evaluation and having regard to the analytical framework set out in the EC Remedies Notice, the Commission considers three key criteria when assessing proposals:

(a) Are the proposals comprehensive and effective?

(b) Are the proposals capable of being implemented effectively within a short period of time?

898 [redacted] Call Note Non-Confidential Summary, dated December 5 December, p. 1, saved as "2022.12.05 [redacted] call V2 [redacted] revisions.pdf".

899 [redacted] Call Note, dated 16 November 2022, p. 1, saved as "2022.11.16 Call with [redacted] with [redacted] s revisions.pdf".

900 [redacted] Call Note, dated 16 November 2022, p. 2, saved as "2022.11.16 Call with [redacted] - with [redacted] s revisions.pdf".

(c) Do the proposals eliminate the competition concerns entirely?

9.41 The Commission, having regard to the above three criteria, sets out its reasoning in assessing the Revised Second Draft Proposals for each of the Relevant Markets below.

Market for the provision of buying group services in the State

Are the proposals comprehensive and effective?

9.42 The Revised Second Draft Proposals are not comprehensive and effective in addressing SLC concerns in the market for the provision of buying group services in the State. The Commission examined barriers to entry and expansion in Section 5 of the Determination, and concluded that, having weighed up all of the evidence before it in relation to entry and expansion, it is unlikely that the Commission's competitive concerns would be ameliorated through entry and/or expansion in the market for the provision of buying group services in the State. In summary, the Commission's reasoning on barriers to entry and expansion in the market for the provision of buying group services includes the following:

a) The ability of buying groups to negotiate large discounts depends, in part on being able to offer manufacturers guaranteed levels of volume and compliance, which requires a minimum scale in membership. The Commission considers that potential de novo entrants would struggle to attract members initially before achieving sufficient scale, meaning that even in the event of such entry, it is unlikely to be timely and sufficient. With regard to existing competitors, IndeGo Plus entered in the market in 2020 and only attained a market share of around [0-10]% in approximately two years.

b) Contrary to the Parties' stated views, the evidence reviewed by the Commission demonstrates buying groups need to make significant investments in technology to support members achieving compliance.

c) A new buying group would likely need to offer its members services beyond those directly related to discounts, in order to compete with incumbent buying groups which offer a wider range of services. The Commission also considers that supplying buying group services at scale would entail planning, staffing, set-up costs and business development in order to enter the market.

d) Axium has, and exercises, substantial buyer power in its negotiations with wholesalers which it can use to lower prices and differentiate itself to pharmacies. A new entrant to the market would not have, in a timely manner, this degree of buyer power and therefore neither Uniphar nor United Drug may have a strong incentive to offer terms to the new entrant, which are comparable to what Navicorp is currently able to negotiate.

9.43 The market testing did not provide compelling evidence to satisfy the Commission that its findings on barriers to entry and expansion in the market for the provision of buying group services will be ameliorated by Remedy Package 1. While interviewees who expressed interest in Remedy Package 1 stated that the acquisition of Remedy Package 1 meant that they could, in principle, also provide buying group services, none viewed the acquisition of CMB services in Remedy Package 1 as a means of entering or expanding and competing in the market for the provision of buying group services. For those interviewees who considered that they may at some point build on the acquisition of Remedy Package 1 to provide buying group services, this was perceived as a longer-term aim and requiring additional investment. The Commission notes that recent experience of a provider of CMB services moving into the provision of buying group services has been [redacted] with the entrant [redacted]

9.44 Remedy Package 2, if implemented effectively, would facilitate the use of the current version of Axium's [redacted] and [redacted] software by an acquirer. While the acquirer could have access to [redacted] under Remedy Package 2, it would not have access to: (i) NaviCorp's expertise and know-how; and (ii) any software updates. It will also not achieve NaviCorp's scale in a timely manner in the market for the provision of buying group services. The Commission has discussed in Section 5 the importance of technology in contributing to Axium's growth in the market for the provision of buying group services. There was some interest by interviewees in Remedy Package 2, reflecting the positive views of Axium's technology expressed by various third parties who contributed to the Commission's review. However, the market testing interviews also raised some concerns about the extent to which Axium's technology still provides a competitive advantage, given developments in the market. Indeed, the Parties have claimed that at least some elements of the functionality offered by Axium's software can now be bought off-the-shelf. Further, some market testing interviewees questioned the value of the Remedy Packages if it did not include sector expertise and a management team.[901]

9.45 The acquisition of Remedy Package 2, if implemented effectively, would allow an acquirer to benefit from Axium's technology (software) in entering or expanding in the market for the provision of buying group services. The Commission notes the almost universal regard with which Axium's technology is held across the industry. However, while the gap between Axium and its competitors appears to have narrowed or reduced, the Commission considers that being able to access and use Axium's current software is not the same as eliminating competition concerns associated with Axium's role in the market. In Section 5, the Commission described how Axium has historically continued to innovate even as its competitors have followed its lead in developing software for the provision of buying group services. The effect of the Proposed Transaction would reduce the incentives among participants in the market to innovate because the competitive

[901] [redacted] Call Note Non-Confidential Summary, dated 5 December 2022, pp. 1-2, saved as "2022.12.05 [redacted] call V2 [redacted] revisions.pdf".

pressure associated with Axium's role would be lost and would not be replaced by Remedy Package 2.

Are the proposals capable of being implemented effectively within a short period of time?

9.46 The Revised Second Draft Proposals entail significant implementation risk. The five interviewees who expressed a degree of interest in the Remedy Packages have all heavily caveated their interest. The Commission has three main concerns. The first concern is about the existence of suitable alternative purchasers. None of the interviewees had intentions to enter or expand in the market for the provision of buying group services absent the Remedy Packages. One interviewee is not currently active in Ireland, and stated that it does not know the Irish market.[902] One interviewee would be dependent on securing investment, and so far has no plans in place.[903] One interviewee currently has a common ownership group in the State, and stated that its current plan is to have a support office function for its current pharmacies and to add pharmacies to its common-ownership group. This interviewee stated that it has no current plans to enter the market for the provision of buying group services.[904] One interviewee questioned how the Remedy Packages would work in practice, and emphasised they would need to see more detail. The final interviewee has no experience in the pharmaceutical industry and expressed concerns about entering into two markets where they would be the smallest of three players and the challenge it would face to scale fast enough.[905] The Commission therefore considers that there are considerable implementation risks associated with the availability of suitable purchasers.

902 [redacted] Call Note Non-confidential Summary, dated 29 November 2022, saved as "2022.11.29 Call with [redacted] pdf".

903 [redacted] Call Note Non-confidential Summary, dated 28 November 2022, p. 1 and p. 3, saved as "2022.11.28_Call_with_[redacted] as_amended_by_[redacted]_final.pdf2".

904 [redacted] Call Note Non-confidential Summary, dated 2 December 2022, p. 2, saved as "2022.12.02 Call with [redacted] RESPONSE.pdf".

905 [redacted] Call Note Non-confidential Summary, dated 6 December 2022, p. 2, saved as "2022.12.07 Call with [redacted] pdf".

9.47 The Commission's second concern is regarding the timeliness of any implementation of the Remedy Packages. None of the interviewees had clear timelines for providing services in the market for the provision of buying group services. Even where interviewees suggested that they could offer CMB services within a specified timeframe, [redacted], it would take additional time to be able to expand to compete at sufficient scale such as to ameliorate the loss of competition resulting from the Proposed Transaction. Furthermore, there was a general view that it would take longer to provide buying group services. Given the Parties' intention that the Revised Second Draft Proposals would be implemented within [redacted] months post completion of the Proposed Transaction, the Commission has significant concerns as regards the timeliness of the implementation as evidenced by the uncertainties on timing raised in the market testing.

9.48 The Commission's third concern is that the Revised Second Draft Proposals provide limited information with respect to implementation. For example, they do not include criteria for the selection of suitable purchasers beyond suggesting that the Revised Second Draft Proposals "*could be attractive to a prospective symbol group entrant within the pharmacy sector or indeed within the grocery retail sector*." The market testing has indicated that this is not necessarily the case. The Commission has not seen evidence of criteria for defining [redacted] that would allow it to conclude that [redacted] will likely remove the competition concerns identified. In order to ameliorate competition concerns, it is not sufficient to simply [redacted]

Do the Revised Second Draft Proposals eliminate the competition concerns entirely?

9.49 According to the Parties, Remedy Package 1 would "[e]liminate perceived competition concerns in respect of buying group … services entirely because it is structural and provides immediate scale to another market player."

9.50 The Parties stated that Remedy Package 2 would *"[e]liminate perceived competition concerns in respect of buying group services entirely because they remove the barriers to entry identified by the Commission in its Assessment regarding technology and access to the Wholesale Supply Agreement."*

9.51 The Commission considers that Remedy Package 1 does not ameliorate the SLC concerns in the market for the provision of buying group services as set out in section 5 of this Determination. In particular, Remedy Package 1 [redacted] would not facilitate the entry or expansion of a competitor in the market for the provision of buying group services to replace the competition lost as a result of the implementation of the Proposed Transaction.

9.52 The market testing did not provide compelling evidence to satisfy the Commission that its findings on barriers to entry and expansion in the market for the provision of buying group services will be ameliorated by Remedy Package 1. Entry into the market for the provision of CMB services through the acquisition of Remedy Package 1 would potentially provide the acquirer with a market presence in CMB services from which to leverage into the provision of buying group services. However, the ability to secure competitive manufacturer funded discounts is closely linked to scale and compliance. Of the interviewees who expressed a level of interest in Remedy Package 1, one has existing experience of negotiating manufacturer funded discounts through its common ownership brand, and could potentially develop buying group services based on that.[906] The other interviewees would be new entrants to both the market for the provision of CMB services and the market for the provision of buying group services. Overall, the acquirer of Remedy Package 1 would be in a position to consider entry, as a small entrant, into the adjacent market for the provision of buying group services.

[906] [redacted] Call Note Non-confidential Summary, dated 2 December 2022, p. 4, saved as "2022.12.02 Call with [redacted] pdf".

9.53 The acquisition of Remedy Package 2, if implemented effectively, would facilitate a potential entrant to the market for the provision of buying group services to [redacted] While this may be an interesting acquisition for a potential market entrant, it does not remove all the barriers to entry identified in this Determination. The acquisition of Remedy Package 2 would not allow an acquirer to benefit from Axium's expertise and innovation, and would not replace Axium as a close competitor of Uniphar in a timely and substantial manner in the market for the provision of buying group services in the State.

9.54 In summary, the loss of NaviCorp would be the loss of a close competitor in a highly concentrated market for the provision of buying group services, and Remedy Package 1 would not replace this loss and so would not ameliorate the Commission's competition concerns. Remedy Package 2 would provide access to [redacted], but this access would not replace Axium's role, expertise and innovation, and so Remedy Package 2 would not ameliorate competition concerns. The Commission therefore considers that the Remedy Package 2 did not ameliorate the competition effects of the loss of NaviCorp which would likely result in an increase in prices (or a reduction in discounts), a loss in service quality, and/or a loss of innovation in the supply of buying group services to retail pharmacies in the State.

Market for the provision of CMB services

Are the proposals comprehensive and effective?

9.55 Remedy Package 1 may in principle allow the acquisition of [redacted] subject to further information being provided. Two of the five interviewees who expressed a degree of interest indicated that the "optional" items in Remedy Package 1 would be essential for them, while the other two indicated that they may be interested in including the "optional" items.[907] Remedy Package 1 may therefore be considered to be comprehensive if the "optional" items are included.

9.56 However, in the Commission's view, Remedy Package 1 is not effective in addressing SLC concerns in the market for the provision of CMB services in the State.

9.57 The Commission examined barriers to entry and expansion in Section 5 of the Determination and concluded that, on the basis of weighing up all of the evidence before it in relation to entry and expansion, it was unlikely that the Commission's competitive concerns would be ameliorated through entry and/or expansion in the market for the provision of CMB services in the State. In summary, the Commission's reasoning on barriers to entry and expansion in the market for the provision of CMB services included the following:

A new entrant would face two main barriers to entry: the need to incur set-up and operating costs; and the costs associated with recruiting members and acquiring scale.

The evidence on past entry shows that only two providers who were not owned by the Parties have entered since 2012 and the most recent entrant, Pure, has only two members. NaviCorp has been a more successful entrant. For example, CarePlus was launched in 2015 and reached [redacted] members in 2021.

Any growth in the market by existing competitors is, due to low levels of switching, likely to be based primarily on the recruitment of new

907 [redacted]

independent pharmacies, and the Commission does not believe it likely that this could be both timely and sufficient.

9.58 The market testing did not provide compelling evidence to satisfy the Commission that its findings on barriers to entry and expansion in the market for the provision of CMB services will be ameliorated by Remedy Package 1. Some interviewees questioned the financial viability of Remedy Package 1 as a standalone business, at least in the short to medium term. A key concern of interviewees is over the scale of Remedy Package 1. As discussed in detail in Section 5, scale is important not just to be able to compete in the market for the provision of CMB services, but also to be able to negotiate and secure competitive manufacturer-funded discounts for members.

9.59 Several interviewees queried whether the set of [redacted] would constitute a viable investment for a potential purchaser, and have sufficient scale to compete effectively in the market for the provision of CMB services.[908] [redacted].[910]

9.60 The Parties have proposed that Remedy Package 1 would offer an acquirer the opportunity to enter or expand in the market for the provision of CMB services and immediate scale in that market. In considering the extent to which Remedy

[908] See [redacted] Call Note, dated 16 November 2022, p. 1, saved as "2022.11.16 Call with [redacted] - with [redacted] s revisions.pdf". and [redacted] Call Note Non-Confidential Summary, dated 5 December 2022, p. 1, saved as "2022.12.05 [redacted] call V2 [redacted] revisions.pdf", Other interviewees, such as [redacted] and [redacted] noted the [redacted]

[909] According to the Annex 5.2 to the Merger Notification Form, [redacted] would represent a [0-10]% share of the market. According to market shares calculated by the Commission (see table 10 above), which is based on market shares provided in Uniphar's Response to Phase 2 RFI, Q43 and NaviCorp Response to Phase 2 RFI, [redacted] would have a [0-10]% share of the market.

[910] The Commission notes the membership numbers are based on 2021 figures, as included in Table 10 above.

Package 1 would ameliorate the effects of the Proposed Transaction on the market for the provision of CMB services and eliminate the Commission's competition concerns, the Commission notes that the acquisition of Remedy Package 1 would remove the barrier of incurring set-up costs that would be faced by a new market entrant. Costs associated with recruiting new members would remain, and the Commission notes the very low levels of switching in the market and the importance of the recruitment of new members.

Are the proposals capable of being implemented effectively within a short period of time?

9.61 The implementation risks identified by the Commission in its discussion of the market for the provision of buying group services above apply also to the implementation of Remedy Package 1 and Remedy Package 2 in the market for the provision of CMB services.

Do the Revised Second Draft Proposals eliminate the competition concerns entirely?

9.62 According to the Parties, Remedy Package 1 would *"[e]liminate perceived competition concerns in respect of…CMB services entirely because it is structural and provides immediate scale to another market player."*

9.63 The Commission concludes that, while an acquisition of Remedy Package 1 would provide entry or expansion in the market for the provision of CMB services, the impact of market entry or expansion would be limited because of the scale of Remedy Package 1. A competitor with [redacted] would not replace the competitive pressure associated with the scale and market position of NaviCorp.

9.64 The loss of NaviCorp would be the loss of a close competitor in a highly concentrated market for the provision of CMB services, and Remedy Package 1 would not replace this loss and so would not eliminate the Commission's competition concerns entirely. The loss of NaviCorp would likely result in an increase in prices (or a reduction in discounts), a loss in service quality, and/or a loss of innovation in the supply of CMB services to retail pharmacies in the State.

The Updated Second Draft Proposals and the Commission's Evaluation

9.65 On 12 December 2022, the Parties submitted updated second draft proposals ("Updated Second Draft Proposals"). The Parties stated that the Updated Second Draft Proposals:

> *"would require Uniphar to have completed the* [redacted] *prior to completing the acquisition of NaviCorp. This* [Updated Second Draft Proposals] *should not require additional market testing as does [sic] not impact the content of the* [Revised Second Draft Proposals] *but rather the timing of the Proposed Transaction."*

9.66 On 13 December 2022, the Commission responded to the Updated Second Draft Proposals, reiterating that its evaluation of all of the draft proposals submitted by the Parties considers the extent to which those proposals address the SLC concerns as set out in this Determination, taking into account all of the available evidence. The Commission's identified SLC concerns relate to the loss of NaviCorp as a close competitor in the Relevant Markets which are highly concentrated.

9.67 The Commission notes that the only substantive change between the Revised Second Draft Proposals and the Updated Second Draft Proposals is that the Proposed Transaction would be conditional on completion of [redacted] (i.e., one element of Remedy Package 1). While this amendment may potentially reduce an aspect of the implementation risk associated with Remedy Package 1, it does not remove all the implementation risks and would not ameliorate the identified SLC concerns as communicated to the Parties throughout the review.

The Third Draft Proposals

9.68 On 14 December 2022, the Parties submitted a further set of draft proposals (the "Third Draft Proposals") which Uniphar considered *"significantly expand the* [Revised Second Draft Proposals]*."* This was 60 working days after the Commission issued the Assessment. Under the Third Draft Proposals:

a. *"Remedy Package 1 is expanded to include the* [redacted]

b. *Remedy Package 1 is enhanced with the extension of* [redacted] *and*

c. *Remedy Package 2 is enhanced with the extension of* [redacted].[911]

9.69 The Parties submitted that they "*do not consider that further market testing is required as the* [Third Draft Proposals] *represent an enhancement of the* [Revised Second Draft Proposals]." The Commission responded to the Parties in relation to the Third Draft Proposals on 15 December 2022. The Commission noted that the Third Draft Proposals are substantively different from the Revised Second Draft Proposals not least in that, for the first time, it is proposed that the [redacted]. Accordingly, the Commission considers that in order to assess adequately whether the Third Draft Proposals would ameliorate the identified SLC concerns, a detailed analysis including taking into account feedback from market testing would be required. The Commission therefore does not agree with the Parties that the Third Draft Proposals do not require market testing. It does not follow that, simply because the Third Draft Proposals go further than the Revised Second Draft Proposals, the Commission would not be required to market test the Third Draft Proposals

[911] Cover letter from the Parties to the Commission, enclosing the Third Draft Proposals, of 14 December 2022.

9.70 Without prejudice to this position and as a preliminary observation, it is not at all clear that the Third Draft Proposals would ameliorate the SLC concerns in respect of the market for buying group services. For instance, without conducting a proper assessment (including market testing) it is simply not possible to determine whether, were a new market entrant [redacted] and to decide to enter the market for buying group services, it would have sufficient scale to compete effectively in that market.

9.71 The statutory deadline for the Commission to make a determination in relation to the Proposed Transaction pursuant to section 22 of the Act is Friday, 16 December 2022 (the "Determination Date"). Accordingly, as the Third Draft Proposals were submitted by the Parties with less than 3 working days until the Determination Date, the Commission did not have sufficient time to assess whether the Third Draft Proposals ameliorate the competition concerns, including carrying out the necessary market testing. Therefore, the Commission was not in a position to take the Third Draft Proposals into account as part of the basis of its determination.

Conclusion

9.72 The Revised Second Draft Proposals were market tested, and the results of the market testing were taken into account in the Commission's evaluation of the proposals. This was communicated to the Parties. The Commission, having regard to the Revised Second Draft Proposals, the submissions of the Parties, the market testing and all the available evidence, has formed the view that the Revised Second Draft Proposals would not ameliorate the Commission's SLC concerns in the Relevant Markets.

10. CONCLUSION

10.1 In the light of its analysis of all the information and evidence, as set out in this Determination, and having considered the efficiencies arguments and proposed remedies, the Commission has formed the view that the Proposed Transaction will result in an SLC in relation to the markets for:

- The provision of buying group services in the State; and
- The provision of CMB services in the State.

11. DETERMINATION

Having considered the notification made to it under section 18(1)(a) of the Competition Act 2002 as amended (the "Act") on 24 December 2021 of a proposed transaction whereby Uniphar plc ("Uniphar") would acquire the entire issued share capital, and thus sole control, of NaviCorp Limited (trading as Navi Group) ("NaviCorp"), and thereby also acquire sole control of NaviCorp's wholly-owned subsidiaries Thera Pharmaceuticals Limited, CarePlus Pharmacy DAC, Touchplus Technologies Limited, and Pembroke Healthcare Limited (the "Proposed Transaction"); and

Having completed its full investigation under section 22 of the Act:

the Competition and Consumer Protection Commission (the "Commission"), in accordance with section 22(3)(b) of the Act has determined that the Proposed Transaction may not be put into effect on the grounds that the result of the Proposed Transaction will be to substantially lessen competition in markets for services in the State, as set out in more detail in the written determination pursuant to section 22(4) of the Act.

Before making a determination in this matter, the Commission, in accordance with section 22(8) of the Act, had regard to any relevant international obligations of the State, and concluded that there were none.

For the Competition and Consumer Protection Commission

Jeremy Godfrey
Chairperson
Competition and Consumer Protection Commission

Coimisiún um Iomaíocht agus Cosaint Tomhaltóirí

Competition and Consumer Protection Commission