DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 2532 **23 September 2022**

COMPETITION COMMISSION

NOTIFICATION TO APPROVE WITH CONDITIONS THE TRANSACTION INVOLVING:

CLICKS RETAILERS (PROPRIETARY) LIMITED
AND
THE RETAIL PHARMACY BUSINESSES CARRIED ON BY PICK N PAY RETAILERS (PTY) LTD

CASE NUMBER: 2021JUL0018

The Competition Commission hereby gives notice, in terms of Rule 38 (3)(c) of the 'Rules for the Conduct of Proceedings in the Competition Commission', that it has approved the transaction involving the abovementioned firms subject to conditions set out below:

1. The Competition Commission of South Africa ("Commission") has been notified of a proposed intermediate merger whereby Clicks Retailers (Pty) Ltd ("Clicks") intends to acquire the retail pharmacy businesses carried on by Pick n Pay Retailers (Pty) Ltd ("Pick n Pay Retailers") under the name of Pick n Pay Pharmacies. There are 25 Pick n Pay pharmacies that will ultimately be acquired by Clicks ("Pick n Pay Pharmacies").

2. Clicks is ultimately owned and controlled by Clicks Group Limited ("Clicks Group"). Clicks Group controls a number of firms. Of relevance to the proposed transaction, the Clicks Group includes United Pharmaceutical Distributors ("UPD"), Unicorn Pharmaceuticals ("Unicorn") and Clicks Direct Medicines ("CDM").

3. Pick n Pay Retailers is a wholly owned subsidiary of Pick n Pay Stores Limited ("Pick n Pay"). The Pick n Pay Pharmacies do not control any firms in South Africa.

4. In terms of the Sale of Business Agreement, Clicks will acquire the Pick n Pay Pharmacies including the pharmacy licences, data, dispensary stock and the transfer of all pharmacy business staff. Following the implementation of the transaction, the Pick n Pay Pharmacies will be controlled by Clicks.

Activities of the merging parties

Clicks

5. The Clicks Group comprises a range of specialist health and beauty retail outlets. Clicks has approximately 620 retail pharmacies in South Africa. UPD holds a wholesale pharmacy licence and operates as a full range pharmaceutical wholesaler and distributor. UPD is the preferred supplier to the Clicks retail store network. CDM is a courier pharmacy service provider. Unicorn is a marketer of generic pharmaceutical products. Unicorn does not perform any manufacturing functions itself but rather has contract manufacturing arrangements with several local and global manufacturers., Unicorn supplies pharmaceutical products to Clicks.

6. The ‘Link Pharmacies’ brand is owned by New Clicks South Africa (Pty) Ltd on behalf of UPD which licenses this brand to third party pharmacies. There are approximately 141 Link Pharmacies which operate on a nationwide basis. The merging parties submit that these pharmacies operate independently from Clicks pharmacies and Clicks has no control over the prices at which these pharmacies sell products.

Pick n Pay Pharmacies

7. The Pick n Pay Pharmacies operate a dispensary and an over-the-counter (“OTC”) business. The general front-shop business that is conducted by a typical retail pharmacy which includes the supply of toiletries, beauty and related products will continue to be part

of Pick n Pay's wider retail offering and does not form part of the pharmacy business which is to be transferred to Clicks.

8. There are currently 33 Pick n Pay pharmacies, 25 of which are the subject of the proposed transaction.

Areas of overlap

9. Both the merging parties operate retail pharmacies. The activities of the merging parties overlap in relation to the retail of scheduled pharmaceutical products.

10. The proposed transaction also presents a vertical overlap in that Clicks, through UPD, is also active in the wholesaling of pharmaceutical products. Unicorn is also an upstream manufacturer of pharmaceutical products.

Relevant markets

11. Based on case precedent and submissions by market participants, the Commission considered the following relevant markets:
    11.1. The national upstream market for the manufacture and supply of pharmaceutical products.
    11.2. The national upstream market for the wholesale distribution of pharmaceutical products.
    11.3. The national downstream market for the retail of scheduled pharmaceutical products (schedules 1 to 8).
    11.4. The local downstream market (0 to 5km) for the retail of scheduled pharmaceutical products.

Competitive assessment

Upstream national market for the manufacture of pharmaceutical products

12. The Commission did not estimate market share estimates for Unicorn in the upstream market for the manufacture of pharmaceutical products as Unicorn does not supply any third-party pharmacy retailers (i.e., Unicorn branded products are only sold in Clicks stores).

Therefore, the transaction will not result in any input foreclosure. The Commission notes however that Unicorn faces competition from several pharmaceutical products manufacturers including Aspen, Adcock, Cipla, Sandoz, Novartis, and Sanofi, among others.

Upstream market for the wholesale distribution of pharmaceutical products (scheduled and unscheduled)

13. UPD will have an estimated national market share in the wholesale distribution of pharmaceutical products of between 19% to 29% based on revenue submitted by UPD and the competitors engaged. UPD faces competition from a number of other wholesale distributors such as Alphapharm, Ring Pharm, Transpharm, Pharma Dynamics, Qestmed, Topmed, and Pharmed among others.

Downstream national market for the retail of scheduled pharmaceutical products

14. The Commission relied on the total annual retail revenue generated and obtained from third parties for the year 2020 as the total market size for the schedule 1 to 8 retail pharmaceutical market. The Commission notes however this is not a total representation of the market as the Commission could not obtain revenue figures from all retail pharmacies in South Africa.

15. At a national level, taking into account national chains and independent groups (with 50 stores and above), the merged entity will have an estimated national market shares of between 32% and 42% in the retail of scheduled pharmaceutical products with a small market share accretion. The merged entity will continue to face competition from Dis-Chem (which includes PPH and TLC), Medirite, Spar, and Arrie Nel. The vertically integrated players in the retail pharmaceutical market include Dis-Chem (CJ Pharmaceuticals), Spar (S Buys), Medirite (Transpharm) and Clicks (UPD and Unicorn).

16. The Commission also considered national market shares which include the smaller independent pharmacy stores that submitted information. Taking into account the local independents, who place a competitive constraint on national chains at the local level, the

merged entity will have estimated national market shares in the retail of scheduled pharmaceutical products of between 30% to 40%, with a small market share accretion.

17. The Commission found that Clicks is the largest corporate group in terms of the number of retail stores in South Africa with a market share of between 12% to 22% (620 stores) followed by Dis-Chem (including PPH and TLC), Shoprite-Medirite and Spar. Pick n Pay accounts for a small share.

18. The Commission also isolated local markets (within 5km radius) where there were either 10 or fewer competitors (excluding Clicks) and markets where there were fewer than 10 independents. The areas considered are Northgate Pick n Pay, Promenade Pick n Pay, Somerset Mall Pick n Pay, Table Bay Mall Pick n Pay, South Coast Pick n Pay, Montana Pick n Pay, Witbank Pick n Pay, Plattekloof Pick n Pay and Pick n Pay Ottery Pick n Pay.

19. In these local markets, the Commission found that there are 1 or 2 competing Dis-Chem pharmacies, as well as 2 or more other corporate competitors. There is also the presence of 4 or more independent pharmacies in each local market. Therefore, there appear to be alternative community pharmacies even in the narrowest local markets.

20. The Commission further considered whether the merged entity would be in a position to materially influence competitive parameters in the retail pharmacy industry. In this regard, the Commission considered factors such as price effects, bargaining dynamics, dispensing fees, barriers to entry, profitability and creeping merger effects that arise as a result of the proposed merger.

Unilateral effects assessment

Price effects assessment

21. To assess the level of price competition between the merging parties and its competitors, the Commission used the final price paid by both cash-paying and medical scheme customers on a sample of top selling and low turnover pharmaceutical products. The Commission carried out price comparisons of the dispensing fee that the merging parties

charge to cash and medical scheme members against competing pharmacies. Based on the data set analysed, there is no discernible pattern that can be deduced and where there are differences, these do not appear to be substantial.

Non-price factors

22. In a regulated market such as retail pharmaceuticals, non-price factors may be particularly important when assessing competition in the market. In the pharmacy market, each group competes on key factors that are unique to their service offering. The corporate and independent pharmacies differ in terms of the product range offered to customers with the corporate pharmacies offering a wider range of products. The corporate pharmacies also tend to be in the urban areas while the independent pharmacies are in the less densely populated areas. Corporate pharmacies tend to compete on offering a wider range of services while in-store pharmacies in retail stores tend to rely on the customers that shop in their stores for groceries.

23. Independent pharmacies, on the other hand place an emphasis on personal service that builds a relationship with clients. This is especially important in the healthcare market where customers may require a more individualised service. The role and importance of independent pharmacies can therefore never be overemphasized especially given the personal and sensitive nature of healthcare. This further accentuates the importance of ensuring the long-term sustainability of independent pharmacies in the market.

Barriers to entry

24. The Commission is of the view that the retail pharmaceutical market is characterized by high barriers to entry and expansion and this is evidenced by the lack of sufficient and timely entry at levels that can compete with the established national corporate players, Clicks and Dis-Chem.

Countervailing power

25. The Commission found that it is unlikely that the proposed transaction will significantly shift the bargaining dynamics in future negotiations against healthcare funders due to the small market share accretion from this transaction.

26. In relation to the cash-paying customers, the acquisition of the Pick n Pay pharmacies by Clicks reduces the alternatives available in the market for such customers. However, the Commission notes that there are sufficient alternatives that consist of both corporate and independents pharmacies within 5km of the merging parties' pharmacies where overlaps arise as a result of the proposed merger.

Removal of an effective competitor

27. Although the Pick n Pay pharmacies are smaller in size, the Commission is of the view that both the merging parties operate corporate retail pharmacies and offer scheduled pharmaceutical products and other clinic services in direct competition against one another. However, Pick n Pay is unlikely an effective competitor given its small footprint and limited focus on its pharmacy business.

Creeping mergers assessment

28. The Commission's investigation found that Clicks has embarked and/or is embarking on a concerted acquisition strategy to acquire small pharmacies. The Commission assessed this proposed merger in the context of the cumulative effect of the many acquisitions over the past five years, the majority of which were not notified to the Commission.

29. The Commission also received concerns about the fact that Clicks, which is vertically integrated, is continuously enlarging its footprint at the retail level. The buyer power of UPD and the ability to drive sales through the increasing retail footprint (from the concerted creeping acquisitions) provides advantages that raise barriers to entry and expansion of other players in the market, especially for small and/or independent pharmacies.

30. Although Clicks has embarked on a creeping merger strategy, the Commission has not, at this stage, uncovered sufficient evidence to suggest that it has been able to exercise market

power from its creeping mergers strategy. There also do not appear to be recognisable price effects from this creeping strategy at present.

31. The Commission nevertheless remains concerned about Clicks' creeping merger strategy and whether it may afford Clicks market power in future. The Commission is therefore imposing a condition that requires Clicks to inform it of all future acquisitions of retail pharmacies.

Vertical assessment

32. With respect to the input foreclosure, the Commission found that the merged entity will unlikely have market power in the upstream market for the manufacture and wholesale of pharmaceutical products that would give it the ability to foreclose downstream market participants with significant anticompetitive effect. The Commission notes that there are several viable alternative players in both the manufacturing and wholesale market segments who can supply pharmaceutical products to downstream retail pharmacies who compete with the merged entity in the downstream retail market.

33. The Commission also found that Pick n Pay Pharmacies account for small market shares in the downstream market for the retailing of pharmaceutical products. Therefore, Pick n Pay does not appear to be a significant customer of any upstream rivals. The Commission is therefore of the view that the proposed transaction is unlikely to result in a substantial customer foreclosure in the market for the wholesale of pharmaceutical products. The lack of customer foreclosure also applies for the upstream manufacture of pharmaceutical products given Pick n Pay's small market share.

Failing firm assessment

34. Although the merging parties have not made a formal failing firm defence, the Commission also considered the financial performance of Pick n Pay.

Counterfactual

35. The Commission takes the view that a pharmacy licence is a valuable and tradeable asset. The Pick n Pay pharmacy licences are particularly valuable as the licences are inside shopping centres that have high footfall. Third parties have indicated that these licences are sought-after due to their lucrative locations. The Commission notes that the license is also a tradeable asset in that if a pharmacy is closed or acquired, the licence hardly exits the market, but is reallocated to a new owner (provided all the necessary requirements are met).

Views of third parties

36. The Commission received concerns from third parties relating to potential exercise of market power by Clicks, an anti-competitive creeping merger strategy that removes a number of independent pharmacies from the market and other public interest concerns as discussed below.

Public interest

Impact on employment

37. Given the uncertainty brought about the transfer of licenses and potential continued trading within the Pick n Pay pharmacies at Pick n Pay stores, the Commission requested the merging parties to provide a moratorium on retrenchments for a period of 3 years. Trade Unions also raised concerns regarding these uncertainties. The merging parties have agreed to this condition.

Impact on ability of SMMEs to compete

38. The Commission also assessed the impact of the proposed merger on the ability of small to medium independent pharmacies (SMMEs) to compete and expand in the retail pharmaceutical market. The Commission took into account the prior acquisitions by Clicks, together with the proposed acquisition of 25 pharmacies in order to determine whether it generates a substantial negative impact on such SMME pharmacies.

39. Part of the concerns received from third parties is that the community pharmacy space is being consolidated by the larger corporate pharmacy chains and this consolidation has a

negative impact on SMMEs pharmacies who often cannot compete effectively. It is submitted that if Clicks is allowed to purchase the additional pharmacies in this transaction, the preferential contracts between Clicks and medical aids schemes will only further cripple the independent pharmacies' ability to compete effectively. This proposed merger will allow Clicks easy access to additional customers via the Pick n Pay footfall. This will draw more clients/patients away from independents. The transaction will result in more small independent pharmacies being squeezed out of the market and closing down.

40. For instance, it is submitted by a third party that this merger is not in the public interest since the merging parties 'cherry pick' the best locations and operate from the main shopping centres and shopping malls in urban areas. Independents are forced to operate in under-serviced and lower income areas. The third party submits that mergers such as the present one further limit the number of profitable sites available to independents. The proposed merger also does not have any positive public interest effect on expanding pharmaceutical services in previously disadvantaged areas.

41. The Commission has noted that Clicks' strategy of buying up small independent pharmacies effectively impedes such SMME pharmacies from participating effectively in the market. The small independent pharmacies currently constrain large corporate players in the market, especially on non-price factors. Because most of the corporates are vertically integrated, the continuous growth by Clicks at the retail layer through acquisitions has the effect of heightening entry barriers and expansion, thereby restricting entry, growth and expansion of SMMEs and their participation in adjacent sectors such as wholesale and distribution of pharmaceuticals.

42. While noting the above negative effects, the proposed transaction in itself does not result in substantial negative public interest effects. The 25 Pick n Pay pharmacies are corporate pharmacies and not independent pharmacies. The stores only add a relatively small position to its existing size, such that the negative effect directly from the proposed merger is unlikely to meet the substantiality test.

Remedies

43. The Commission invited the parties to make submissions regarding the competition concerns and public interest concerns arising as a result of the proposed merger. The merging parties have since agreed to the following conditions:
    43.1. To not restrict competition between the front shop business of Pick n Pay and Clicks within the Pick n Pay stores where Clicks will operate the dispensaries. This essentially addresses the market allocation concern and will endure as long as Clicks operates a pharmacy within a Pick n Pay store.
    43.2. To notify all future acquisitions by Clicks within the retail of pharmaceutical products market.
    43.3. A 3-year moratorium on merger-specific retrenchments

44. The Commission is of the view that the above conditions alleviate the concerns that are brought about by the merger.

Conclusion

45. The Commission approves the proposed merger subject to conditions in Annexure A.

ANNEXURE A

CLICKS RETAILERS (PROPRIETARY) LIMITED

AND

THE RETAIL PHARMACY BUSINESSES CARRIED ON BY PICK N PAY RETAILERS (PTY) LTD

CASE NUMBER: 2021JUL0018

DEFINITIONS

1.1. The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings –

1.1 "**Acquiring Firm**" means Clicks;

1.2 "**Approval Date**" means the date referred to on the Commission's merger Clearance Certificate;

1.3 "**Clicks**" means Clicks Retailers (Proprietary) Limited;

1.4 "**Commission**" means the Competition Commission of South Africa;

1.5 "**Competition Act**" means the Competition Act 89 of 1998, as amended;

1.6 "**Commission Rules**" mean Rules for the Conduct of Proceedings in the Commission;

1.7 "**Conditions**" mean, collectively, the conditions referred to in this document;

1.8 "**Days**" mean any day other than a Saturday, Sunday or official public holiday in the South Africa;

1.9 "**Implementation Date**" means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;

1.10 "**LRA**" means the Labour Relations Act 66 of 1995 as amended;

1.11 "**Merger**" means the acquisition of the business of the Target Firm by the Acquiring Firm;

1.12 "**Merged Entity**" means the Acquiring Firm and the Target Firm following the Merger;

1.13 "**Merging Parties**" means the Acquiring Group, the Target Firm and the Seller;

1.14 **"Pharmaceutical Market"** means the retail pharmacy store market for the provision of scheduled, unscheduled and front shop products;

1.15 "**Pick n Pay Retailers**" means Pick n Pay Retailers (Pty) Ltd;

1.16 **"Seller"** means Pick n Pay Retailers;

1.17 "**Small Merger"** means a proposed merger, in the Pharmaceutical Market, that would fall within section 11(5)(a) of the Competition Act;

1.18 "**South Africa**" means the Republic of South Africa;

1.19 "**Target Firm**" means the retail pharmacy businesses carried on by Pick n Pay Retailers;

1.20 "**Tribunal**" means the Competition Tribunal of South Africa; and

1.21 "**Tribunal Rules**" mean Rules for the Conduct of Proceedings in the Tribunal.

CONDITIONS TO THE APPROVAL OF THE MERGER

2. **Employment**

2.1 The Merging Parties shall not retrench any employees as a result of the Merger for a period of 3 (three) years from the Implementation Date as well as the period between the Approval Date and the Implementation Date.

2.2 For the sake of clarity, retrenchments exclude (i) voluntary separation arrangements; (ii) voluntary early retirement packages, (iii) unreasonable refusals to be redeployed in accordance with the provisions of the LRA; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger; (vi) terminations in the ordinary course of business, excluding but not limited to, dismissals as a result of misconduct or poor performance; and (vii) any decision not to renew or extend a contract of a contract worker.

3. **Commitment to inform the Commission of future pharmacy acquisitions**

3.1 The Acquiring Firm undertakes to inform the Commission in writing (the Notice), for a 5 (five) year period from the Implementation Date, of any Small Merger in terms of which it may directly or indirectly acquire another entity in the Pharmaceutical Market.

3.2 For the avoidance of doubt, the Acquiring Firm's obligation set out in clause 3.1 above, will not automatically trigger the provisions of sections 13(2) and (3) of the Competition Act. In this regard, the Commission will exercise its powers in terms of section 13(3) in the ordinary cause upon receipt of the Notice.

3.3 The obligation in clause 3.1 above shall not in any way affect the notification requirements provided for in the Competition Act for transactions that meet the requirements of the Competition Act for merger notification.

4. **No restraint**

4.1 The Merging Parties shall not enter into any agreements between them which limits Clicks from selling any products in the pharmacies which Clicks acquires from Pick n Pay in terms of this Merger; including front shop items such as schedule 0 medications. The condition shall apply as long as Clicks leases dispensary space within a Pick n Pay store.

5. **MONITORING OF COMPLIANCE WITH THE CONDITIONS**

5.1 The Merging Parties shall inform the Commission of the Implementation Date within 5 (five) Days of its occurrence.

5.2 The Merging Parties shall each circulate a copy of the Conditions to their employees, recognised trade unions and employee representatives of the Target and Acquiring firm within 5 (five) Days of the Approval Date.

5.3 As proof of compliance with 5.2 above, a director of each Merger Party shall within 10 (ten) Days of circulating the Conditions, submit to the Commission an affidavit attesting to the circulation of the Conditions and provide a copy of the notice that was sent to the employees in that regard.

5.4 The Acquiring Firm shall, on each anniversary of the Approval Date submit an affidavit confirming compliance with the conditions set out at 2.1 and 2.2.

5.5 The Merged Entity shall submit a comprehensive annual compliance report to the Commission, setting out the extent of its compliance with clauses 3 and 4 of the Conditions for the duration of the Conditions.

6. **APPARENT BREACH**

6.1 In the event that the Commission receives any complaint in relation to non-compliance with the above Conditions, or otherwise determines that there has been an apparent breach by the Merging Parties of these Conditions, the breach shall be dealt with in terms of Rule 39 read together with Rule 37 of the Competition Tribunal Rules.

7. **VARIATION**

7.1 The Merged Entity may at any time, and on good cause shown, apply to the Commission for any of the Conditions to be waived, relaxed, modified and/or substituted. Should a dispute arise in relation to the Merged Entity's application to the Commission, the Merged Entity may apply to the Tribunal for appropriate relief.

8. **GENERAL**

8.1 All correspondence in relation these conditions must be submitted to the following email address: mergerconditions@compcom.co.za and ministry@thedtic.gov.za.

Enquiries in this regard may be addressed to the Manager: Mergers and Acquisitions Division at Private Bag X23, Lynnwood Ridge, 0040. Telephone: (012) 394 3298