



## DETERMINATION OF MERGER NOTIFICATION M/15/077 - UNIPHAR/MURRAY'S MEDICAL

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### Section 21 of the Competition Act 2002

### Proposed acquisition by Uniphar Wholesale Limited of sole control of the ostomy and urinary wholesale business of Murray's Medical Equipment Limited

Dated 23 March 2016

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#### Introduction

1. On 22 December 2015, 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 notification of a proposed transaction whereby Uniphar Wholesale Limited, a subsidiary of Uniphar plc ("Uniphar"), would acquire sole control of the ostomy and urinary wholesale business (the "Target Business") of Murray's Medical Equipment Limited ("Murray's Medical").
2. The proposed acquisition is to be completed pursuant to an asset and business purchase agreement dated 18 December 2015 between Uniphar Wholesale Limited, Murray's Medical, Mr. David Murray and Mr. Robert Murray<sup>1</sup> (the "Asset and Business Purchase Agreement"). The proposed acquisition is an acquisition of assets within the meaning of section 16(1)(c) of the Act. The assets which are the subject of the Asset and Business Purchase Agreement comprise the ostomy and urinary wholesale business of Murray's Medical.

#### The Undertakings Involved

##### *Uniphar*

3. Uniphar, a public limited company headquartered in Dublin, has two main business divisions: Uniphar Wholesale and Allphar Services Limited ("Allphar"), a wholly-owned subsidiary of Uniphar.
4. Uniphar Wholesale is a full-line wholesaler of pharmaceutical, healthcare, medical and veterinary products to pharmacies, hospitals and veterinary surgeons in the State. Uniphar Wholesale purchases a wide range of products from manufacturers and re-sells them to community pharmacies and hospitals. Uniphar Wholesale does not sell to customers outside the State. Uniphar operates four storage and distribution depots in Dublin, Cork, Sligo and Limerick.

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<sup>1</sup> Mr. David Murray and Mr. Robert Murray are shareholders in Murray's Medical, [...].



5. Uniphar Wholesale's activities encompass the following four product categories:
  - The wholesale supply of pharmacy-only human pharmaceutical drugs including both prescription medicines and pharmacy-only, over-the-counter medicines;
  - The wholesale supply of front-of-counter and non-pharmacy-only products. This includes health and beauty products and human pharmaceutical drugs such as paracetamol, the sale of which is not confined to pharmacies;
  - The wholesale supply of medical products (e.g., urology and ostomy-related products, diagnostic kits, enteral feeding tubes, etc); and
  - The wholesale supply of veterinary drugs.
6. Allphar is a pre-wholesale logistic service provider in respect of pharmaceutical products, healthcare products, veterinary products and healthcare equipment and acts for that purpose as a sole agent and distributor in the State on behalf of manufacturers. Allphar's core function is to warehouse and distribute pharmaceutical, healthcare and veterinary products on behalf of its client companies. It also provides additional services including marketing and administrative support. Allphar mainly supplies to full-line pharmaceutical wholesalers, pharmacies and hospitals. Allphar is also involved to a limited extent in the direct supply of pharmaceutical products to pharmacies on behalf of manufacturers.
7. On 29 January 2016, the Commission cleared Uniphar's acquisition of sole control of Lindchem Limited, which, at the time of the notification of the proposed acquisition to the Commission, owned 28 community pharmacies in the State.<sup>2</sup>
8. For the financial year ending 31 December 2015, Uniphar's worldwide turnover was approximately €[...], of which €[...] was generated in the State.

#### *Murray's Medical*

9. Murray's Medical supplies community pharmacies with a wide range of medical products including blood pressure monitors, ostomy and urinary products, thermometers, injury prevention products, back care products, seasonal affective disorder light therapy, and first aid supplies.
10. For the financial year ending 31 October 2015, Murray's Medical's worldwide turnover was approximately €[...], of which €[...] was generated in the State.

#### *The Target Business*

11. The Target Business comprises the business of Murray's Medical pertaining to the wholesale supply of ostomy and urinary medical products to community pharmacies in the State. The Target Business does not supply ostomy and urinary medical products to hospitals. The Target Business also provides guidance and advice to community pharmacies and end customers regarding its ostomy and urinary medical products. The

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<sup>2</sup> See merger determination M/15/076 – Uniphar/Lindchem which can be accessed at <http://ccpc.ie/enforcement/mergers/merger-notices/m15076-uniphar-lindchem>



staff who are involved in the Target Business will transfer to Uniphar as part of the proposed transaction.

### **Rationale for the Proposed Transaction**

12. The parties state in the notification:

*“Uniphar Wholesale has recently sought to expand its wholesale ostomy/urinary operations in order to improve its full-line wholesale offering to pharmacies. The acquisition of the Target Assets will, in particular, enable Uniphar to compete more effectively with the other full-line wholesaler in the State, United Drug.”*

### **Preliminary Investigation (“Phase 1”)**

#### **Contacts with the Undertakings Involved**

13. On 29 January 2016, the Commission served a Requirement for Further Information (“RFI”) on each of Uniphar and Murray’s Medical pursuant to section 20(2) of the Act. This adjusted the deadline within which the Commission had to conclude its assessment of the proposed transaction in Phase 1.
14. Upon receipt of the responses to the RFIs from each of Uniphar and Murray’s Medical, the “appropriate date” (as defined in section 19(6)(b)(i) of the Act) became 18 February 2016.<sup>3</sup>
15. During its investigation, the Commission requested and received, on an on-going basis, further information and clarifications from the notifying parties.

#### **Third Party Submission**

16. No third party submission was received by the Commission during its investigation.

#### **Market Enquiries**

17. During its investigation, the Commission drew up a questionnaire to be answered by the parties’ top 10 community pharmacy customers (for ostomy and urinary medical products) in the State in 2015. These customers were identified from a list of the parties’ top 10 community pharmacy customers in the State provided to the Commission. Ten community pharmacies in total (five for each party) responded to the Commission’s questionnaire.
18. The Commission also drew up a questionnaire to be answered by three competitors of the merging parties currently active in the supply of ostomy and urinary medical products to community pharmacies in the State. These competitors were identified from a list of the parties’ top 5 competitors in the State provided to the Commission in the notification. The Commission received a full response from all three competitors.

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<sup>3</sup> The “appropriate date” is the date from which the time limits for making both Phase 1 and Phase 2 determinations begin to run.



### Industry Background – The Wholesale Supply of Ostomy and Urinary Medical Products<sup>4</sup>

19. An ostomy is a surgically created opening in the body for the discharge of body wastes. Urinary refers to the organs, structures, and ducts by which urine is produced and discharged by the body. Examples of ostomy and urinary medical products include catheters, drainage bags, gastrostomy tubes and disposal bags.
20. A wholesaler of ostomy and urinary medical products acts as a middleman between the manufacturer and the community pharmacy or hospital. Wholesalers obtain products from manufacturers (or their pre-wholesale agents), store those products in anticipation of pharmacy or hospital demand, and then sell and deliver the desired quantity of products to community pharmacies and/or hospitals. Wholesalers who supply ostomy and urinary medical products typically also supply a wide range of pharmaceutical products, including pharmacy-only human pharmaceutical drugs.
21. To compete effectively in its local retail market, a community pharmacy<sup>5</sup> must meet the service demands of its customers by supplying a wide range of pharmaceutical products (including ostomy and urinary medical products) as quickly as possible. This makes the fast, efficient distribution of pharmaceutical products from wholesaler to community pharmacy an important feature of the pharmacy sector.

#### *Full-line Wholesalers*

22. The wholesaling of pharmaceutical products in the State is primarily carried out by full-line wholesalers, who are authorised and regulated by the Health Products Regulatory Authority. Full-line wholesalers carry an extensive range of pharmaceutical products (including ostomy and urinary medical products) and generally make deliveries twice daily during the week and once on a Saturday to community pharmacies from a small number of distribution depots. Community pharmacies typically use two full-line wholesalers: a primary full-line wholesaler that supplies most of the pharmacy's needs and a secondary full-line wholesaler that is used if there are supply problems with the primary wholesaler. Competition between full-line wholesalers takes place with respect to two factors: discounts and service quality.

#### *Pre-wholesalers*

23. Full-line wholesalers also act as agents on behalf of pharmaceutical manufacturers and distribute these firms' products to competing full-line wholesalers (who in turn supply these products to pharmacies), community pharmacies and hospital pharmacies. This business is referred to as "pre-wholesaling". Rather than operate their own distribution operation, many pharmaceutical manufacturers contract this function out to an agent, who provides a full range of services, including storage, marketing, invoicing and delivery. Pharmaceutical manufacturers pay a separate fee for pre-wholesaling services.

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<sup>4</sup> This section draws heavily from section 2 of the merger determination of the Commission's predecessor, the Competition Authority, in *M/12/027 – Uniphar/CMR*, which provides a detailed description of the pharmaceutical wholesaling industry in the State. This can be accessed at <http://ccpc.ie/enforcement/mergers/merger-notices/m12027-unipharcmr>

<sup>5</sup> This determination is concerned with the wholesale supply of ostomy and urinary medical products to community pharmacies, as the Target Business does not supply such products to hospitals.



#### *Short-line Wholesalers/Parallel Importers*

24. Short-line wholesalers/parallel importers represent an alternative distribution model whereby they carry a much smaller inventory of pharmaceutical products and deliver with less frequency than full-line wholesalers. Many of the pharmaceutical products sold by short-line wholesalers are parallel imported from wholesalers located in the European Union when arbitrage opportunities arise.

#### *Direct-to-Pharmacy*

25. Another model of distribution is direct-to-pharmacy (“DTP”), whereby a pharmaceutical manufacturer uses a logistics service provider (“LSP”), which may be a full-line wholesaler, to distribute its products directly to a pharmacy. The LSP does not take title of the pharmaceutical products since the manufacturer deals directly with the pharmacy. The manufacturer sets the price and other terms of supply (e.g., the frequency of delivery) to the pharmacy and pays the LSP (or full-line wholesaler) a fee for delivering the product. Thus, in this context, full-line wholesalers compete with LSPs for the business of the pharmaceutical manufacturer.
26. On 1 June 2015, Coloplast, a manufacturer of ostomy and urinary medical products, switched to a DTP model using United Drug Supply Chain Services (“United Drug”)<sup>6</sup> for the supply of its products to community pharmacies in the State. Previously, United Drug had acted as a pre-wholesaler for Coloplast, supplying wholesalers in the State with Coloplast’s products. United Drug informed the Commission that Coloplast is the only manufacturer of ostomy and urinary medical products using a DTP model in the State.

#### **Setting the Price of Ostomy and Urinary Medical Products in the State**

27. In its response to the Commission’s RFI dated 17 February 2016, Murray’s Medical provided the following information to the Commission:

*“As of 1<sup>st</sup> April 2015, the Primary Care Reimbursement Service (“PCRS”)<sup>7</sup> implemented new reimbursement prices for all ostomy and urinary appliances sold in the State. These prices, which had been fixed since 2007, were part of a review that commenced in November 2013. The reimbursement prices were historically agreed by the manufacturers and the PCRS each September for the coming calendar year. After an eight year embargo on new products and no price increases the PCRS now required each manufacturer to supply their pricing for all their ostomy and urinary products supplied in each and every European market. There was no real dialogue between the manufacturers and the PCRS and in February 2015 the PCRS presented each manufacturer with their new*

<sup>6</sup> United Drug is a full-line wholesaler of pharmaceutical products (including ostomy and urinary medical products) active in the State. It operates three distribution depots located in Dublin, Limerick and Ballina.

<sup>7</sup> The PCRS is part of the Health Service Executive (“HSE”) and, according to the latter’s website, is “responsible for making payments to healthcare professionals, like doctors, dentists and pharmacists, for the free or reduced costs services they provide to the public.” See <http://www.hse.ie/eng/staff/PCRS/>



*pricing effective 1<sup>st</sup> April 2015. Each manufacturer had 4 days to accept or be delisted from 1<sup>st</sup> April 2015. In nearly every instance, the manufacturers accepted the new pricing despite the fact that the vast majority of lines were subject to an average price reduction of c. 20%.”*

28. Full-line wholesalers thus have limited influence over the price of ostomy and urinary medical products in the State. In order to entice a pharmacy to purchase pharmaceutical products (including ostomy and urinary medical products), full-line wholesalers offer discounts which are primarily dependent on the total value of purchases made by the pharmacy, the length of credit given to the pharmacy (e.g., 0, 30, 60 days), and the bargaining strength of the pharmacy in negotiations with the full-line wholesaler. As noted above, full-line wholesalers also seek to attract the custom of pharmacies by offering a high quality delivery service.

### **Competitive Analysis**

29. There is a both a horizontal and vertical overlap between the parties’ activities in the State.

#### *Horizontal Overlap*

30. There is a horizontal overlap between the parties’ activities in the State with respect to the wholesale supply of ostomy and urinary medical products to community pharmacies.<sup>8</sup>

### **Relevant Product and Geographic Market**

#### *Views of the Undertakings Involved*

31. With respect to the relevant product market, the notification states the following:

*“The parties submit that the relevant product market in which to assess the proposed acquisition is the supply of medical supplies in the State (i.e., the distribution of medical supplies from manufacturers to downstream market players such as wholesalers, hospitals and community pharmacies)... This approach would accord with that of the CCPC in its 2013 clearance decision regarding the proposed acquisition by Uniphar of Cahill May Roberts Limited (the “Uniphar/CMR Determination”). In the Uniphar/CMR Determination, the CCPC examined the competitive impact of the notified transaction in the market for the supply of medical supplies. This encompassed both the LSP/pre-wholesale supply and the wholesale supply of medical supplies.”*

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<sup>8</sup> There is no horizontal overlap between the parties with respect to the wholesale supply of ostomy and urinary medical products to hospitals in the State since the Target Business does not supply ostomy and urinary medical products to hospitals.



*“Given the precedents of the CCPC and the [European] Commission, the tendency for a whole range of medical supplies to be provided by wholesalers, pre-wholesalers and LSPs, and the low barriers to entry in terms of supplying a new type of medical supply, the parties submit that there is no valid reason to consider the supply of ostomy/urinary products (distinct from medical supplies generally) to constitute a separate product market(s). A wholesaler currently supplying medical supplies other than ostomy/urinary products would have no difficulty in obtaining supplies of ostomy/urinary products from a pre-wholesaler or manufacturer. Similarly a pre-wholesaler/LSP would have little difficulty in obtaining ostomy/urinary supplies from a manufacturer given the tendency for manufacturers to switch to new pre-wholesalers/LSPs in this area... Supply-side characteristics thus clearly point to an overall market for the supply of medical supplies.”*

32. With respect to the relevant geographic market, the notification states the following:

*“The parties submit that the relevant geographic market is the State, given the scope and set-up of the distribution networks of pre-wholesalers, full-line wholesalers etc. This is consistent with the approach of the CCPC in the Uniphar/CMR Determination.”*

#### *Views of the Commission*

33. The Commission defines markets to the extent necessary depending on the particular circumstances of a given case. In this instance, the Commission does not need to come to a definitive view on whether the wholesale supply of ostomy and urinary medical products to community pharmacies occupies a separate and distinct product market or is part of a broader market encompassing the wholesale supply of different types of medical products to community pharmacies.<sup>9</sup> The precise product market definition will not materially alter the Commission’s assessment of the competitive impact of the notified transaction. In order to determine whether the proposed transaction might result in a substantial lessening of competition, the Commission assessed its impact on competition by reference to the narrowest possible relevant product market, namely the wholesale supply of ostomy and urinary medical products to community pharmacies.
34. With respect to the relevant geographic market, the Commission considers that the view expressed by its predecessor, the Competition Authority, in paragraphs 3.37-3.39 of its merger determination in *M/12/027 – Uniphar/CMR* with respect to full-line

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<sup>9</sup> As noted earlier, there is no horizontal overlap between the parties with respect to the wholesale supply of ostomy and urinary medical products to hospitals in the State since the Target Business does not supply ostomy and urinary medical products to hospitals.





pharmaceutical wholesaling is equally applicable to the wholesale supply of ostomy and urinary medical products to community pharmacies:

*“The relevant geographic market for full-line pharmaceutical wholesaling may be national as each of the three full-line wholesalers operate nationally, using strategically located depots. Each of the three full-line pharmaceutical wholesalers has pharmacy customers located in all counties in the State. The Authority also considers it significant that Uniphar’s morning deliveries to all of its pharmacy customers in the State are made from its Dublin depot with Uniphar’s regional depots in Cork, Sligo and Limerick only being used for evening deliveries to locally-based pharmacies. ...this centralisation process by Uniphar has been facilitated by Ireland’s improved road network. ...the Authority will examine the competitive impact of the proposed transaction in the State. The Authority, however, does not need to come to a definitive view on the precise relevant geographic market because its conclusions concerning the competitive impact of the proposed transaction, outlined below, would be unaffected whether the relevant geographic market is narrow (e.g., regional) or broader to encompass the State.”*

35. In conclusion, for the purpose of its competitive assessment, the Commission examined the competitive impact of the proposed transaction on the wholesale supply of ostomy and urinary medical products to community pharmacies in the State.

### **The Wholesale Supply of Ostomy and Urinary Medical Products to Community Pharmacies in the State**

#### Market Structure

36. Paragraph 3.1 of the Commission’s Guidelines for Merger Analysis<sup>10</sup> states the following:

*“A central element in assessing the competitive impact of a merger is identifying its effect on market structure.”*

37. Market structure can be characterised by the number and size distribution of firms. The initial impact of any merger or acquisition is felt on market structure as two firms pre-acquisition become one firm post-acquisition.
38. Table 1 below presents market share data over the period 2013-2015 for the full-line wholesale supply of ostomy and urinary medical products to community pharmacies in

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<sup>10</sup> Guidelines for Merger Analysis adopted by the Commission on 31 October 2014 (the “Guidelines for Merger Analysis”). See [http://www.ccpc.ie/sites/default/files/CCPC%20Merger%20Guidelines\\_1.pdf](http://www.ccpc.ie/sites/default/files/CCPC%20Merger%20Guidelines_1.pdf)





the State.<sup>11</sup> Based on turnover information provided to the Commission by the parties and United Drug, the total size of the potential full-line wholesale ostomy and urinary medical products segment in the State was €[...] in 2015, compared to €[...] in 2013.

**Table 1: The Full-line Wholesale Supply of Ostomy and Urinary Medical Products to Community Pharmacies, by Value (€) %, 2013-2015, the State**

	2013	2014	2015
United Drug	[70-80]%	[60-70]%	[60-70]%
<b>Uniphar</b>	<b>[0-10]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>
<b>Target Business</b>	<b>[20-30]%</b>	<b>[20-30]%</b>	<b>[10-20]%</b>
Total (€, millions)	[...]	[...]	[...]

Source: Information provided by the parties and United Drug.

39. United Drug is the clear market leader with a [60-70]% share of the full-line wholesale supply of ostomy and urinary medical products to community pharmacies in the State in 2015. Uniphar has more than doubled its share of the segment over the period 2013-2015,<sup>12</sup> while the Target Business, in contrast, has lost some market share over this period.
40. Market concentration refers to the degree to which production/supply in a particular product market is concentrated in the hands of a few large firms. The most commonly used measure of concentration is the Herfindahl-Hirschman Index (“HHI”), which is defined as the sum of the squares of the market shares of all firms participating in the market. According to paragraph 3.10 of the Commission’s Guidelines for Merger Analysis<sup>13</sup>, any market with a HHI greater than 2,000 is highly concentrated while a change in the pre-merger HHI compared to the post-merger HHI of less than 150 is “unlikely to cause concern” (paragraph 3.10). Therefore, if the post-merger HHI is above 2,000 and the change in the HHI is greater than 150, this indicates that firms in that market may be able to exercise market power.
41. Based on the market shares set out in Table 1 above, the potential segment for the full-line wholesale supply of ostomy and urinary medical products to community pharmacies in the State is highly concentrated. The HHI post-acquisition would be 5,722 while the change in the HHI would be 480. The HHI calculations therefore indicate that the proposed transaction may potentially raise competition concerns. This does not necessarily mean that the proposed transaction is likely to result in a substantial lessening of competition; rather, it means that the Commission should intensify its analysis of the competitive impact of the proposed transaction.<sup>14</sup>

<sup>11</sup> Although the Target Business is not a full-line wholesaler of pharmaceutical products (including human pharmaceutical drugs), it does carry a full range of ostomy and urinary medical products which it supplies to community pharmacies. The Commission therefore considers the Target Business to be a full-line wholesale supplier of ostomy and urinary medical products.

<sup>12</sup> In its response to the Commission’s RFI dated 18 February 2016, Uniphar provided the following information to the Commission: “Uniphar commenced activities in the wholesale supply of ostomy and urinary medical products in 2009 as part of its core portfolio but had no dedicated ostomy/urinary team or targeted promotion of this service until 2015... Uniphar launched a new ostomy/urinary products business in February 2015. It invested in a fully automated cutting machine to allow ostomy products that require bespoke cutting to be prepared to the highest possible standard. Uniphar also invested in a dedicated ostomy/urinary team at this time and developed a web solution allowing customers to place their orders online.”

<sup>13</sup> See [http://www.ccpc.ie/sites/default/files/CCPC%20Merger%20Guidelines\\_1.pdf](http://www.ccpc.ie/sites/default/files/CCPC%20Merger%20Guidelines_1.pdf)

<sup>14</sup> Paragraph 3.11 of the Guidelines for Merger Analysis.

42. For completeness, the Commission has tried to estimate market shares of the parties and key competitors for total wholesale supply of ostomy and urinary medical products to community pharmacies in the State. Table 2 below presents estimated market share data over the period 2013-2015 for the total wholesale supply of ostomy and urinary medical products to community pharmacies in the State (i.e., including sales made by short-line wholesalers/parallel importers and sales made through the direct-to-pharmacy (“DTP”) route by manufacturers of ostomy and urinary medical products).<sup>15</sup>

**Table 2: The Wholesale Supply of Ostomy and Urinary Medical Products to Community Pharmacies, by Value (€) %, 2013-2015, the State**

	2013	2014	2015
United Drug	[60-70]%	[60-70]%	[60-70]%
<b>Uniphar</b>	<b>[0-10]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>
<b>Target Business</b>	<b>[10-20]%</b>	<b>[10-20]%</b>	<b>[10-20]%</b>
Salts Healthcare <sup>16</sup>	[0-10]%	[0-10]%	[0-10]%
Laker Pharmaceuticals <sup>17</sup>	[0-10]%	[0-10]%	[0-10]%
Total (€, millions)	[...]	[...]	[...]

Source: Information provided by the parties, United Drug, Salts Healthcare and Laker Pharmaceuticals.

43. As in Table 1 above, United Drug is the clear market leader with a [60-70]% share of the wholesale supply of ostomy and urinary medical products to community pharmacies in the State in 2015. Uniphar has more than doubled its share of the potential market over the period 2013-2015, while the Target Business, in contrast, has lost some market share over this period.

#### Competitive Effects Analysis

44. Assessing the competitive effects of the proposed transaction requires the identification of any relevant theories of harm (i.e., how the proposed transaction could result in a substantial lessening of competition) and an analysis of those theories of harm through an evaluation of the available evidence.
45. For the purpose of assessing the competitive impact of the proposed transaction in the potential market for the wholesale supply of ostomy and urinary medical products to community pharmacies in the State, the Commission identified two relevant theories of harm to be evaluated: coordinated effects and unilateral effects.

<sup>15</sup> This wholesale data, however, is not complete since it excludes, due to unavailability of such data, sales to community pharmacies made by short-line wholesalers other than Laker Pharmaceuticals Limited (“Laker Pharmaceuticals”) and sales to community pharmacies made through the DTP route by manufacturers other than Salts Healthcare Limited (“Salts Healthcare”).

<sup>16</sup> Salts Healthcare manufactures its own-branded ostomy and urinary medical products in the United Kingdom which it supplies to wholesalers, community pharmacies (via the DTP route) and hospitals in the State. The data in Table 2 refers only to sales by Salts Healthcare to community pharmacies in the State. Salts Healthcare informed the Commission that up until April 2015 it supplied the ostomy and urinary medical products of competing manufacturers to customers in the State but a price reduction imposed by the HSE on all ostomy and urinary medical products in the State significantly reduced margins thereby making it financially unattractive for Salts Healthcare to continue selling the ostomy and urinary medical products of competing manufacturers.

<sup>17</sup> Laker Pharmaceuticals is the sole wholesale distributor in the State of the ostomy and urinary medical products manufactured by Dansac. Laker Pharmaceuticals does not supply the ostomy and urinary medical products of any other manufacturer in the State.



### Coordinated Effects

46. Coordinated effects, as explained in paragraph 4.23 of the Guidelines for Merger Analysis, occur when *“there is an incentive for firms to compete less intensively if it is profitable for them to do so. Implementing coordinated behaviour depends on the opportunity afforded by weak competitive constraints from actual or potential competition.”*
47. Paragraph 4.24 of the Guidelines for Merger Analysis states that *“competition concerns can also arise from tacit coordination, i.e., coordination through implicit understandings of competitors’ behaviour derived without any overt agreements or communications between competitors. While there are various forms of coordinated behaviour, a common feature is predictable and sustainable “terms of coordination”, i.e., a set of formal or informal rules by which each participating firm generally understands (i) how it should behave and (ii) how it can expect other participating firms to behave.”*

### Views of the Undertakings Involved

48. The notification makes the following arguments in relation to the likelihood of coordinated effects post-transaction:

*“Various features of the ostomy/urinary sector show that this will not occur. These features include the following: (a) The shares of supply of the various players are not symmetric - United Drug will be the largest player, with Uniphar having a significantly smaller share, and Laker and Salts having broadly similar (smaller) shares of supply; (b) As noted above, pricing of ostomy/urinary products is largely set by the PCRS [the Health Service Executive’s Primary Care Reimbursement Service]. Price competition thus focuses on discounts. Discounts (and pricing of non-PCRS products) are non-transparent as these are negotiated individually on a bilateral basis with each pharmacy. Pricing/discounts are thus insufficiently transparent to enable suppliers to reach any agreement to coordinate on discounts/pricing; (c) While there are similarities between Uniphar and United Drug in terms of frequency of supply, medical supplies/ostomy and urinary products constitute a very small portion of the products supplied by them and there would thus be no incentive to coordinate on deliveries, as the twice-daily delivery service is offered in respect of pharmaceuticals and there is thus no additional cost involved in also offering this service for medical supplies. The full-line wholesalers have a strong incentive to continue to offer a twice-daily delivery service to customers; and (d) Any attempt by the two full-line wholesalers (Uniphar and United Drug) to engage in any collusion in ostomy/urinary products would be defeated by reactions from current short-line*



*wholesalers, current DTP supply by manufacturers, and new entry by manufacturers and wholesalers.”*

#### *Views of the Commission*

49. The Commission considers that the proposed transaction will not make it sufficiently more likely that Uniphar and United Drug will engage in tacit coordinated behaviour as to substantially lessen competition in the potential market for the wholesale supply of ostomy and urinary medical products to community pharmacies in the State. This view is based on the following reasons and evidence.

#### Views of Community Pharmacies

50. The Commission drew up a questionnaire to be answered by the parties' top 10 community pharmacy customers (for ostomy and urinary medical products) in the State in 2015. Ten community pharmacies in total (five for each party) responded to the Commission's questionnaire. No community pharmacy that responded to the Commission's questionnaire raised any competition concerns about the proposed transaction.

51. Six community pharmacies expressed the view that the proposed transaction would have a positive impact on their business as the service provided by Uniphar is likely to improve post-transaction.<sup>18</sup> For example, pharmacy 1 expressed the following view to the Commission:

*“The service to end consumers will [...] as the turnaround time for delivery of goods will be [...] to all parts of the country and the movement of the expert staff from Murray's to Uniphar prevents the loss of their advice available to pharmacists on all items for ostomy/urinary needs.”*

52. Pharmacy 2 expressed the following view to the Commission:

*“Streamlining of ostomy/urinary orders, possibility to order all lines for same day or next day delivery including Saturdays, possibility to check availability of products online in real time any time of the day. Considerable time saving and better customer service overall. Quicker and prompter delivery of products to end consumers.”*

53. Three community pharmacies also expressed the view to the Commission that the effect of the proposed transaction will be to replicate the competitive situation that currently exists in the State with respect to the wholesale supply of pharmacy-only human pharmaceutical drugs, where Uniphar and United Drug are the only two full-line

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<sup>18</sup> [...] was expressed to the Commission by United Drug in its response to a questionnaire for competitors of the merging parties drawn up by the Commission: “[...]”



wholesalers of pharmacy-only human pharmaceutical drugs currently active in the State.<sup>19</sup>

#### Views of Competitors

54. No competitor that responded to the Commission's questionnaire raised any competition concerns about the proposed transaction.
55. United Drug expressed the following view to the Commission:

“[...]”

#### Conditions and Evidence Considered for Coordinated Behaviour<sup>20</sup>

56. In assessing the potential for the proposed transaction to result in coordinated effects, the Commission assessed whether the conditions that are generally necessary for successful coordination are present or likely to arise, in particular the ability to identify terms of coordination. The Commission considers that the potential market for the wholesale supply of ostomy and urinary medical products to community pharmacies in the State does not present the characteristics such that rules for coordination are likely to be reached and maintained post-transaction for the reasons set out below.
57. As detailed in paragraphs 5.42-5.43 of the former Competition Authority's merger determination in *M/12/027 – Uniphar/CMR*, there are two possible candidates for coordination in the potential market for wholesale supply of ostomy and urinary medical products to community pharmacies in the State: (a) the discount (or set of discounts) granted by a wholesaler to a community pharmacy; and (b) the frequency of delivery provided by a wholesaler to a community pharmacy.
58. With respect to likelihood of Uniphar and United Drug coordinating on discounts post-transaction, the Commission considers that the view expressed in paragraphs 5.50-5.51 of the former Competition Authority's merger determination in *M/12/027 – Uniphar/CMR* with respect to pharmaceutical wholesaling in the State is equally applicable to the wholesale supply of ostomy and urinary medical products to community pharmacies in the State:

*“Given the fact that the discount granted to each customer is negotiated on a bilateral basis and depends, in part, on the negotiating power of each individual customer, it is on balance difficult to see how a rule for coordination on discounts could be reached and maintained by Uniphar and United Drug post-transaction. The Authority is therefore of the view that although the level of transparency regarding the discounts offered by*

<sup>19</sup> On 30 April 2013, the former Competition Authority approved the acquisition by Uniphar of Cahill May Roberts Limited. The merging parties in that case were two full-line wholesalers of pharmacy-only human pharmaceutical drugs in the State. See merger determination *M/12/027 – Uniphar/CMR* which can be accessed at <http://ccpc.ie/enforcement/mergers/merger-notices/m12027-unipharcmr>

<sup>20</sup> Paragraphs 5.10-5.92 of the former Competition Authority's merger determination in *M/12/027 – Uniphar/CMR* provide a detailed assessment of the likelihood of coordinated effects in relation to the acquisition by Uniphar of Cahill May Roberts Limited.



*full-line wholesalers may increase post-transaction, discounts are unlikely to be sufficiently transparent to enable Uniphar and United Drug to reach and maintain any agreement to coordinate on discounts.”*

59. With respect to likelihood of Uniphar and United Drug coordinating on delivery frequency post-transaction, the Commission also considers that the view expressed in paragraph 5.78 of the former Competition Authority’s merger determination in *M/12/027 – Uniphar/CMR* is equally applicable to the wholesale supply of ostomy and urinary medical products to community pharmacies in the State:

*“With respect to delivery frequency, there is currently a relatively high degree of transparency in the pharmaceutical wholesaling market in the State. Furthermore, the degree of transparency regarding delivery frequency is likely to increase post-transaction. Thus, for the reasons outlined above, the Authority considers that the full-line pharmaceutical wholesaling market in the State appears to present the characteristics such that rules for coordination on delivery frequency could be reached by Uniphar and United Drug post-transaction.”*

60. However, as noted in paragraph 5.79 of the former Competition Authority’s merger determination in *M/12/027 – Uniphar/CMR*, there are other conditions that must be met before the Commission could conclude that the proposed transaction will substantially harm competition by making it more likely that Uniphar and United Drug will engage in coordinated interaction, namely whether Uniphar and United Drug would have the ability and incentive to deviate from any agreement to coordinate their behaviour and whether there are competitive constraints which might deter any attempt by Uniphar and United Drug to coordinate their behaviour.
61. The Commission considers that any attempt by Uniphar and United Drug to coordinate on delivery frequency post-transaction is likely to break down since the incentive to compete in order to maintain their position as a community pharmacy’s primary wholesaler of pharmaceutical products (including ostomy and urinary medical products) is likely to outweigh the incentive to coordinate. Furthermore, and most significantly, Uniphar and United Drug currently also compete in a neighbouring potential market for the wholesale supply of pharmacy-only human pharmaceutical drugs in the State.<sup>21</sup> Any agreement to coordinate on delivery frequency for the wholesale supply of ostomy and urinary medical products post-transaction is likely to be unstable (and therefore unlikely to be maintained) if, at the same time, Uniphar and United Drug are competing with respect to both discounts and delivery frequency in the wholesale supply of pharmacy-only human pharmaceutical drugs in the State.<sup>22</sup>

<sup>21</sup> Both Uniphar and United Drug currently provide twice-daily deliveries of human pharmaceutical drugs to community pharmacies in the State on a weekday and one delivery on a Saturday.

<sup>22</sup> Furthermore, it is not clear how Uniphar and United Drug would come to an agreement on the precise terms of coordination since each full-line wholesaler delivers human pharmaceutical drugs and ostomy and urinary medical products to community pharmacies in the same delivery.



62. The Commission is of the view that, on balance, any attempt by Uniphar and United Drug to coordinate on discounts and/or delivery frequency post-transaction is likely to break down since the incentive to compete in order to maintain their position as a community pharmacy's primary wholesaler is likely to outweigh the incentive to coordinate.
63. The Commission also considers that the presence of short-line wholesalers/parallel importers (although the price cuts imposed by the HSE on all ostomy and urinary products sold in the State from 1 April 2015 are likely to have reduced the financial viability of parallel importing<sup>23</sup>) and the threat that manufacturers may switch to the DTP distribution model may deter or disrupt any attempt by Uniphar and United Drug to tacitly coordinate on discounts and/or delivery frequency post-transaction. In this regard, it is significant that, as noted above, Coloplast, a manufacturer of ostomy and urinary medical products, switched in June 2015 to a DTP model (using United Drug) to supply its products to community pharmacies in the State. The Commission understands that this change by Coloplast was prompted by the price cuts imposed by the HSE on all ostomy and urinary products sold in the State from 1 April 2015.<sup>24</sup> These price cuts also impacted on Murray's Medical. In its response to the Commission's RFI dated 17 February 2016, Murray's Medical expressed the following view to the Commission:

*"The loss of Coloplast...meant that Murray's Medical was now looking at a decrease on its sales and contribution down circa [...] % from March 2015. [...]"<sup>25</sup>*

#### Conclusion on Coordinated Effects

64. For the reasons set out above and considering all the evidence, the Commission considers that, on balance, the proposed transaction will not make it sufficiently more likely that Uniphar and United Drug will engage in coordinated behaviour in the potential market for the wholesale supply of ostomy and urinary medical products to community pharmacies in the State as to substantially lessen competition.

#### Unilateral Effects

65. Unilateral effects, as explained in paragraph 4.23 of the Guidelines for Merger Analysis, 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."

#### Views of the Undertakings Involved

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<sup>23</sup> In its response to the Commission's RFI dated 17 February 2016, Murray's Medical expressed the following view to the Commission: "The new PCRS pricing introduced in April 2015 meant that parallel imports were also less viable as the significantly cheaper UK supplies of ostomy and urinary reimbursable items were now in most cases more expensive than the new prices obtaining in the State."

<sup>24</sup> [...] As noted above, Salts Healthcare manufactures its own-branded ostomy and urinary medical products in the United Kingdom which it supplies to wholesalers, community pharmacies (via the DTP route) and hospitals in the State.

<sup>25</sup> An internal document provided to the Commission by Murray's Medical dated May 2015 forecasts that total sales of ostomy and urinary medical products by Murray's Medical in the State will decline by [...] % from total sales in 2014 and it also contains the following statement: "decrease in sales from 2014...is due to PCRS pricing [and] Coloplast switching to a direct to pharmacy model."





66. The notification makes the following arguments in relation to the likelihood of unilateral effects post-transaction:

*“In terms of unilateral effects, United Drug is and will remain a strong and vigorous competitor to Uniphar in the supply of ostomy/urinary products. The wholesale pharmacy sector has long been characterised by intense competition between, in particular, United Drug and Uniphar. Should Uniphar offer a less competitive price or service to pharmacies in respect of ostomy/urinary products after the proposed acquisition, a significant number of customers would switch to United Drug for wholesale supplies of ostomy/urinary products. As noted above, switching by pharmacies is straightforward and common. In addition, significant switching to other wholesalers of ostomy/urinary products and to DTP supply by manufacturers would also take place. These players will provide a significant competitive constraint in the supply of ostomy/urinary products to community pharmacies post completion of the proposed acquisition.”*

#### *Views of the Commission*

67. Uniphar will only have the incentive to exercise market power by reducing its discounts and/or service quality post-transaction if it would be profitable to do so. In order for this to occur, Uniphar and the Target Business should be close competitors to each other in the wholesale supply of ostomy and urinary medical products to community pharmacies in the State. If this is the case, a decrease in discounts by Uniphar post-transaction could result in little or no switching by pharmacies making it profitable for Uniphar to reduce its discounts.
68. The Commission considers that each of the three full-line wholesalers of ostomy and urinary medical products (i.e. Uniphar, United Drug and the Target Business<sup>26</sup>) is substitutable for the other two as they each sell more or less the same products and offer a relatively similar delivery service to pharmacies.<sup>27</sup> Notwithstanding the Target Business’s smaller size relative to both United Drug and Uniphar, the internal documentation provided to the Commission by Murray’s Medical clearly indicates that it perceives the Target Business to be a close competitor to both United Drug and Uniphar in the wholesale supply of ostomy and urinary medical products to community

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<sup>26</sup> As noted above, the Target Business, unlike United Drug and Uniphar, is not a full-line wholesaler of human pharmaceutical drugs. The Target Business, however, does carry a full range of ostomy and urinary medical products which it supplies to community pharmacies in the State.

<sup>27</sup> There are, however, differences in delivery frequency between, on the one hand, United Drug and Uniphar and, on the other, the Target Business. United Drug provides a same day delivery service to community pharmacies located in Leinster, with eleven deliveries in total each week and a next day delivery service to community pharmacies located outside Leinster, with six deliveries in total each week. Uniphar provides a twice daily delivery service to community pharmacies located in major cities and towns in the State because these areas can be easily reached from Uniphar’s Citywest depot in Co. Dublin. Uniphar only provides a one-daily delivery service to community pharmacies in more remote parts of the State (e.g., parts of Co. Kerry, Co. Cork, Co. Mayo and Co. Donegal) because these pharmacies are serviced out of Uniphar’s regional depots and ostomy and urinary medical products are not stocked in these depots. In contrast to United Drug and Uniphar, the Target Business only provides a one-daily, next day delivery service to community pharmacies in the State. United Drug expressed the following view to the Commission: “[...]”



pharmacies. An internal document provided to the Commission by Murray's Medical dated May 2015 contains the following statement:

*"[Murray Medical] has built a strong portfolio of loyal customers; recognised and valued nationwide brand;... competitive alternative to larger players in its industry."*

69. Internal documentation provided to the Commission clearly indicates that Uniphar considers that the proposed transaction will provide it with the opportunity to better compete with United Drug in the wholesale supply of ostomy and urinary medical products to community pharmacies in the State. For example, an internal document provided to the Commission by Uniphar dated [...] contains the following statement:

*"[...]"*

70. The internal documentation provided to the Commission by Uniphar and Murray's Medical clearly indicates that both parties perceive United Drug to be a close competitor in the wholesale supply of ostomy and urinary medical products in the State. This is unsurprising given that United Drug is the clear market leader (as evidenced in Tables 1 and 2 above) for the wholesale supply of ostomy and urinary medical products to community pharmacies in the State.
71. The Commission considers that Uniphar will not have the ability to exercise market power by reducing its discounts and/or the frequency of its deliveries post-transaction. Any such attempt by Uniphar post-transaction is likely to prompt community pharmacies to switch to United Drug.<sup>28</sup> Moreover, as noted in paragraph 5.97 of the former Competition Authority's merger determination in *M/12/027 – Uniphar/CMR*, United Drug has the capacity to expand output and absorb any increase in business resulting from community pharmacies switching away from Uniphar post-transaction.
72. On this basis, it is the Commission's view that the proposed transaction will not lead to a unilateral decrease in discounts or delivery frequency offered by Uniphar as Uniphar will not have the ability to do so post-transaction. Uniphar launched a new ostomy and urinary medical products business in February 2015. As illustrated in Table 2 above, Uniphar has more than doubled its share of the potential market for the wholesale supply of ostomy and urinary medical products to community pharmacies in the State over the period 2013-2015. The Commission considers that, on balance, Uniphar is likely to continue to compete vigorously with United Drug post-transaction, and vice versa, in order to increase its market share<sup>29</sup> in the wholesale supply of ostomy and urinary medical products in the State.

### Conclusion on Unilateral Effects

73. For the reasons set out above and considering all the evidence, it is the Commission's view that, on balance, the proposed transaction will not lead to a unilateral exercise of

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<sup>28</sup> The costs of switching between wholesalers are not high.

<sup>29</sup> As indicated in Table 2 above, post-transaction, Uniphar's market share in the potential market for the wholesale supply of ostomy and urinary medical products to community pharmacies in the State will be around [20-30]%, significantly less than United Drug's market share of around [60-70]%.



market power in the potential market for the wholesale supply of ostomy and urinary medical products to community pharmacies in the State.

#### *Vertical Overlap*

74. There is a vertical overlap between the parties' activities in the State as the pre-wholesale division of Uniphar supplies wholesalers (including the Target Business) with ostomy and urinary medical products manufactured by Hollister and TPW Surgical. The Target Business also supplies a small amount of ostomy and urinary medical products to Uniphar, which comprises approximately [...] % of Uniphar's total requirement for ostomy and urinary medical products.
75. In its assessment of the proposed transaction, the Commission considered whether the proposed transaction would provide Uniphar with the ability and incentive to foreclose its rival full-line wholesaler of ostomy and urinary medical products, United Drug, by, for example, limiting supplies of such products to United Drug in order to restrict United Drug's ability to supply ostomy and urinary medical products to community pharmacies in the State. The Commission considers that manufacturers of ostomy and urinary medical products would not allow their pre-wholesaler to limit supplies of their products to wholesalers in the State. Uniphar would therefore appear to have a limited ability to restrict supplies of ostomy and urinary medical products to wholesalers following the proposed transaction. Uniphar also informed the Commission that under its contracts with [...].
76. The Target Business does not currently supply United Drug (or any wholesalers other than Uniphar) with ostomy and urinary medical products. There will thus be no impact on supply to third party wholesalers of ostomy and urinary medical products. Furthermore, any ostomy and urinary medical products which United Drug might seek to purchase from the Target Business are also available direct from manufacturers.
77. In terms of customer foreclosure, there would be no incentive following the proposed transaction for Uniphar to reduce its purchases of ostomy and urinary medical products from other pre-wholesalers, such as United Drug. In order to compete effectively with United Drug, Uniphar will need to offer a full range of ostomy and urinary medical products to community pharmacies and thus would have no incentive to refuse to deal with pre-wholesalers such as United Drug.
78. In light of the above, the Commission considers that the proposed transaction will not substantially lessen competition in any market for goods or services in the State.

#### **Ancillary Restraints**

79. In the notification, the parties provided a copy of the Asset and Business Purchase Agreement between the parties to the proposed transaction, which contains a number of restrictive obligations on Murray's Medical and its two shareholders, Mr. David Murray and Mr. Robert Murray. These include a non-compete clause. None of these restrictive obligations exceeds the maximum duration acceptable to the Commission.<sup>30</sup>

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<sup>30</sup> In this respect, the Commission follows the approach adopted by the EU Commission in paragraphs 20 and 26 of its "Commission Notice on restrictions directly related and necessary to concentrations" (2005). For more information see [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XC0305\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XC0305(02)&from=EN)



The Commission considers these restrictions to be directly related to and necessary for the implementation of the proposed transaction.



### **Determination**

The Competition and Consumer Protection Commission, in accordance with section 21(2)(a) of the Competition Act 2002, has determined that, in its opinion, the result of the proposed transaction whereby Uniphar Wholesale Limited would acquire sole control of the ostomy and urinary wholesale business of Murray's Medical Equipment Limited will not be to substantially lessen competition in any market for goods or services in the State, and, accordingly, that the acquisition may be put into effect.

For the Competition and Consumer Protection Commission

**Isolde Goggin**  
**Chairperson**  
**Competition and Consumer Protection Commission**