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PUBLIC VERSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

Triton Fund V L.P.
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Subject: **Case M.10255 – TRITON / BERGMAN CLINICS**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 28 June 2021, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Triton group ("Triton", Jersey) intends to acquire by way of purchase of shares sole control of the whole of Bergman Healthcare Clinics B.V. ("Bergman Clinics", the Netherlands), within the meaning of Article 3(1)(b) of the Merger Regulation (hereinafter, the "Transaction").[3] Triton is designated hereinafter as the "Notifying Party" and together with Bergman Clinics as the "Parties".

1 OJ L 24, 29.1.2004, p. 1 (the 'Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

2 OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

3 Publication in the Official Journal of the European Union No C 262, 5.7.2021, p. 21.

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1. THE PARTIES

(2) **Triton** is a private equity fund investing primarily in medium-sized businesses headquartered in Central and Northern Europe with a particular focus on four core sectors, namely Business Services, Industrials, Consumer and Health. One of Triton's portfolio companies, Aleris Group AB, is active in the provision of ophthalmological services in both Sweden and Norway.

(3) **Bergman Clinics** operates focus clinics throughout the Netherlands, Sweden, Denmark, Norway and Germany offering medical care in the fields of orthopaedics, ophthalmology, gynaecology, aesthetic medicine, cardiology, gastroenterology, dermatology and vascular medicine. One of Bergman Clinics' portfolio companies, Memira AB, is active in the provision of ophthalmological services across the Nordic countries.

2. THE CONCENTRATION

(4) Triton,[4] through BNS Bidco B.V. ("BNS"),[5] an investment vehicle incorporated for the purpose of the Transaction, intends to acquire a majority of shares in Hippocrates Capital B.V., which is the holding company of Bergman Clinics and its subsidiaries, from its current owners Malenstein Holding B.V. ("Malenstein"), NPM Capital N.V. ("NPM") and Stichting Administratiekantoor Hippocrates Capital, collectively referred to as the "Sellers".

(5) The Sellers initiated a sale of the shares in Hippocrates Capital B.V. through a controlled auction process and Triton was selected as the purchaser.

(6) The Transaction will be implemented through the signing of a Share Purchase Agreement ("SPA"). Each of the Parties obtained all necessary corporate and other internal approvals to agree on a draft SPA. The Parties recorded this agreement by entering into a Signing Protocol executed on 8 March 2021.

(7) Triton will acquire, indirectly through BNS and two holding companies currently wholly owned by Triton, LuxCo 53 and LuxCo 54, a majority of the share capital in Bergman Clinics.

(8) BNS will acquire full ownership of Bergman Clinics, through the purchase of 100% of the share capital of its holding company, Hippocrates Capital B.V.

(9) NPM, Malenstein and Triton have negotiated a Co-Investment Term-sheet outlining the main terms of their future shareholding in Hippocrates Capital B.V. It is contemplated that shortly following the acquisition by Triton, the Sellers will reinvest a part of the purchase price that will not be paid in cash by subscribing for shares issued by LuxCo 53.

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4 Triton will acquire Bergman Clinics via its private equity fund, Triton V.

5 BNS Bidco B.V. is solely controlled by Triton indirectly through a series of wholly owned holding companies, one of which is Triton V LuxCo 53 S.à.r.l ("LuxCo 53"). LuxCo 53 is solely owned and controlled by Triton through the holding company Triton V LuxCo 54 S.à r.l ("LuxCo 54").

(10) In parallel, certain managers of Bergman Clinics and other selected individuals closely connected with Triton and/or Bergman Clinics will have the opportunity to subscribe for shares in LuxCo 53 via a pooling vehicle to be incorporated in the form of a Luxembourg law société en commandité par actions ("SCA").

(11) As a result, following the Transaction, the ownership structure of LuxCo 53 will change, without leading to a change in control of LuxCo 53. Triton will continue to own the controlling majority of shares in LuxCo 53 through LuxCo 54. It is currently envisaged that […]% of the ordinary share capital in LuxCo 53 will be held by LuxCo 54, […]% by Malenstein and […]% by NPM, such percentages to be reduced pro rata by the shares to be allocated to the SCA, which shall range in the range of […]% to […]% of the ordinary share capital.

(12) As a result of the Transaction, Triton will acquire sole control of Bergman Clinics, since none of Bergman Clinics' minority shareholders will acquire control, via LuxCo 53, over Bergman Clinics.

(13) Decisions in LuxCo 53 will be taken through both the general meeting of LuxCo 53, in which Triton holds the majority of the voting rights, and a supervisory board implemented at the level of BNS, whose members appointed by Triton will hold the majority of the voting rights. Malenstein will be allowed only to appoint [minority appointment rights to the supervisory board of BNS of Malenstein] and NPM [minority appointment rights to the supervisory board of BNS of NPM].

(14) Therefore, all strategic decisions (including the adoption of annual budget, business plan, appointment of senior management) can be adopted by Triton through a simple majority vote in BNS' supervisory board.

(15) The sole control held by Triton is not affected by the fact that, pursuant to the Co-Investment Term-sheet, certain decisions will require the positive vote of NPM and Malenstein and, for some of them, of the SCA. Those decisions concern investment protection rights which do not qualify as strategic in nature. They concern *inter alia* amendments to the articles of association of LuxCo 53 that would be disproportionately detrimental to Malenstein and NPM compared to Triton or entering into related party agreements.

(16) The proposed Transaction therefore constitutes a concentration pursuant to Article 3(1)(b) of the Merger Regulation by which Triton acquires sole control over Bergman Clinics.

3. UNION DIMENSION

(17) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million[6] (Triton:[7] EUR 17 526 million, Bergman Clinics:[8] EUR 368 million). Each of them have an EU-wide turnover in excess of EUR 250 million (Triton: EUR […] million, Bergman Clinics: EUR […] million), but they do not

6 Turnover calculated in accordance with Article 5 of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C 95, 16.4.2008, p. 1).

7 Triton's turnover was provided for financial year 2019.

8 Bergman Clinics' turnover was provided for financial year 2020.

achieve more than two-thirds of their aggregate Union-wide turnover within one and the same Member State.

(18) The notified operation therefore has a Union dimension pursuant to Article 1(2) of the Merger Regulation.

4. MARKET DEFINITION

4.1. Introduction

(19) Triton, through its existing portfolio company Aleris, and Bergman Clinics, through Memira, are both active in the provision of ophthalmology services in Sweden and Norway. More specifically, both Parties provide various eye surgery and lens exchange procedures, each with a distinct focus on a different eye condition.[9]

(20) Generally, the Parties' activities mainly overlap with respect to:[10] (i) refractive laser surgery in Norway; (ii) refractive lens exchange surgery in Sweden; and (iii) refractive lens exchange surgery in Norway.[11]

4.2. Relevant product markets

(21) The Parties' activities overlap in relation to the provision of refractive laser surgery and refractive lens exchange ("RLE surgery").

(22) Refractive laser surgery procedures such as LASEK[12] and LASIK[13] can be used to correct astigmatisms, short-sightedness or long-sightedness by reshaping the inner eye, specifically the cornea.

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9 Form CO, paragraph 79 and Table 4.

10 Form CO, paragraphs 166-171: in addition, the Parties' activities also generate a hypothetical overlap in relation to ambulatory hospital services in Germany. As the Notifying Party explains, Triton owns Klinik Schöneberg, a clinic that operates out of a single location in Berlin, Germany. It offers services in approximately 25 different specialty areas. Bergman Clinics entered the German market in September 2020 when it acquired Capio clinics (previously part of the Ramsay Santé group). Capio has 6 clinics that specialize in vascular surgery and eye care. There are therefore only overlaps between Klinik Schöneberg and Capio clinics in 4 areas, namely: aesthetic surgery, ear nose and throat (ENT), vascular treatments and orthopaedics. However, the position of Klinik Schöneberg is extremely small with only […] outpatient and […] inpatient guests annually (the total German market for inpatient and outpatient visits is estimated roughly at 18 million and 820 million visits per year respectively). In addition, most of Capio clinics are located in the middle of Germany with one in the south. All locations are more than 5 hours' drive from Klinik Schöneberg in Berlin. Bergman Clinics also recently acquired a single clinic in Stuttgart under the brand Medical One which performs plastic and aesthetical treatments. This location is over 600 km away from Berlin. Given the very limited and altogether hypothetical nature of any overlap between the activities of Triton and Bergman Clinics in Germany, the Commission will not discuss further the provision of ambulatory hospital services in Germany.

11 Form CO, paragraph 163: for the sake of completeness, the Notifying Party notes that Aleris had negligible sales in consumer vision care products in Norway (less than EUR […] in 2020), whereas Memira achieved revenue of only EUR […] from consumer vision care product sales in Sweden. According to the Notifying Party, these limited activities in different geographies do not give rise to an affected market.

12 Form CO, paragraphs 136-167: LASEK, or laser-assisted subepithelial keratectomy, is a form of corrective eye surgery that combines photorefractive keratectomy ("PRK") and LASIK technologies. With LASEK, the outer layer of the cornea is loosened by using an ethanol, or diluted alcohol,

(23) The implantation of intraocular lenses involve similar procedures but are microsurgical rather than laser based refractive eye surgery, and can be used to treat cataracts, short-sightedness or long-sightedness. In particular, RLE surgery, also called lens replacement surgery or clear lens extraction, is a type of corrective eye surgery that is materially similar to cataracts procedure,[14] generally suitable for patients over 50 years old who suffer from presbyopia.

4.2.1. Refractive laser surgery

(24) The Commission has previously defined a retail market for optical products, services and eyewear as a whole, without further segmentation based on the sales channel, price or any other factor.[15] Conversely, the Commission also considered that contact lenses, ophthalmic lenses and refractive laser surgery are all alternative solutions for correcting visual impairments but that contact lenses do not fall in the same relevant product market as ophthalmic lenses.[16]

(25) The Commission has analysed the market for the provision of hospital services by distinguishing between inpatient (acute) hospital procedures conducted in hospitals and outpatient (ambulatory) procedures conducted in hospitals.[17] The Commission has also examined whether a distinction between different specialist medical departments should be made, ultimately leaving open the exact market definition.[18]

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solution. The procedure uses a computer to map the eye's surface and calculate how much tissue to remove. The tissue is then brushed away, and the laser is used to reshape the stroma underneath. The same laser and technology are used in both LASEK and LASIK procedures, but during the former, the outer tissue of the cornea is often discarded instead of folded back and reattached. After the epithelial, or top layer, of the cornea is mostly removed, it is then replaced and repositioned after the ablation of the cornea during LASEK. The outer layer of the cornea will regenerate quickly, typically within three to five days. In the meantime, a special medicated contact lens bandage is used to protect the eye during healing.

13 Form CO, paragraphs 136-138: LASIK, or laser in-situ keratomileusis, is a procedure that reshapes the cornea to enable it to refract light properly. During the procedure, the surgeon uses a femtosecond laser to cut away the top flap of the cornea and fold it back to access the stromal tissue at its core. The femtosecond laser creates gas bubbles to separate the corneal flap with precise and focused pulses. An excimer laser is then used to reshape the stroma through a process called photoablation. The flap is then replaced and typically will seal itself without the need for further medical intervention (like stitches) within approximately a day.

14 Form CO, paragraph 151: cataract surgery is performed under local anesthesia using a microscope and micro-surgical instruments and can be performed manually or laser-assisted. The latter involves the use of a femtosecond cataract laser. The focusing power of the eye is restored by replacing the cataract with a permanent intraocular lens implant.

15 Commission decision of 1 March 2018 in Case M.8394 – *Essilor/Luxottica*, paragraph 135.

16 Commission decision of 1 March 2018 in Case M.8394 – *Essilor/Luxottica*, paragraph 141.

17 Commission decision of 15 November 2016 in Case M.8146 – *Carlyle/Schön Family/Schön Klinik*, paragraphs 9 and 15; Commission decision of 4 December 2018 in Case M.9044 – *CVC / RECORDATI*, paragraph 21.

18 Commission decision of 4 August 2014 in Case M.7309 – *Bridepoint / EdRCP*, paragraph 24; Commission decision of 16 October 2018 in Case M.9128 – *Vivalto Santé / Groupe Capio France*, paragraph 16.

Notifying Party's views

(26) The Notifying Party submits that to the best of its knowledge, the Commission has not previously defined relevant markets in relation to ophthalmological eye surgeries, including refractive laser surgery.[19]

(27) The Notifying Party indicates that the Competition and Markets Authority in the UK ("CMA") has investigated the UK market for corrective eye surgery. The CMA considered that different treatments are unlikely to be substitutable from a patient's perspective given that a particular treatment will be required – or preferred – depending on the suitability of the patient and their needs. The CMA has identified a relevant product market for refractive laser surgery.[20]

(28) The Notifying Party submits that eye surgery constitutes a product market on its own due to distinct demand and supply side characteristics. Whether this market would form part of the broader optical retail market or the ambulatory surgical care market has not been determined by the Notifying Party in the absence of previous Commission precedents.[21] Ultimately, the Notifying Party believes that the product market definition can be left open since even on the narrowest basis, no competitive concerns arise as a result of the Transaction.[22]

Commission's assessment

(29) The Parties' activities overlap in the provision of ophthalmological treatments and services, and more specifically in the provision of refractive laser surgery and RLE surgery. These overlaps stem from the activities of two specialist ophthalmological clinics, namely Aleris on the one hand, controlled by Triton, and Memira on the other hand, controlled by Bergman Clinics.

(30) The Commission has so far not defined or considered relevant product markets neither for ophthalmological treatments and services, nor more specifically for refractive laser surgery and RLE surgery. However, the Commission has considered in previous decisions a distinction between different specialist medical departments.[23]

(31) As the Commission Notice on the definition of relevant market indicates, market definition is a tool to identify and define the boundaries of competition between firms and its main purpose is to identify the competitive constraints that the

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19 For completeness, it should be noted that in the view of the Notifying Party, the areas of their activities that give rise to overlaps as a result of the Transaction could potentially be seen as falling within two different broad product markets, namely (i) the markets for (refractive or reimbursed) ophthalmological ambulatory surgical care services, and (ii) the market for retail optical services (see Form CO, paragraph 74).

20 Case ME/5898/13 – Optimax Clinics Unlimited/Ultralase Limited, decision of the Office of Fair Trading of 29 July 2013, paragraphs 55-56.

21 Form CO, paragraph 92.

22 Form CO, paragraph 147.

23 Commission decision of 4 August 2014 in Case M.7309 – *Bridepoint / EdRCP*, paragraph 24; Commission decision of 16 October 2018 in Case M.9128 – *Vivalto Santé / Groupe Capio France*, paragraph 16.

undertakings involved face.[24] In turn, undertakings are typically subject to three main sources of competitive constraints: demand substitutability, supply substitutability and potential competition, though the latter is in principle not taken into account when defining markets.[25]

(32) From a demand side perspective, treatments for different conditions are hardly substitutable and substitutability between treatments for the same condition can also be limited, as apparent from the investigation conducted into the UK market for corrective eye surgery mentioned in paragraph 27 above.

(33) From a supply side perspective, as mentioned, the overlap between the Parties' activities concerns ophthalmological treatments and relevant procedures and, more specifically, refractive laser surgery and RLE surgery. Hence, for the purposes of defining the boundaries of competition between the Parties, these particular procedures constitute a natural starting point.[26]

(34) Hence, for the purposes of assessing the likely impact of the Transaction on competition, the Commission considers that plausible product market definitions include ophthalmological treatments and services and, at the narrowest level, treatments for specific conditions, such as refractive laser surgery, or combinations thereof.[27]

Conclusion

(35) For the purpose of the present decision, the Commission considers that the exact product market definition for refractive laser surgery can be left open since the Transaction does not raise serious doubts as to its compatibility with the internal market irrespective of the alternative market definition considered.

4.2.2. RLE surgery

(36) At the outset, the general considerations formulated in paragraphs 24 to 25 above apply equally to RLE surgery.

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24 Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] *O.J.* C 372/5, para. 2 ("Commission Notice on market definition").

25 Commission Notice on market definition, paras. 20 and 24.

26 Commission Notice on market definition, para. 16.

27 According to the Notifying Party (see Form CO, paragraphs 124-126), both RLE and refractive laser surgery generally require the same operating environment, and a refractive focused service provider which offers one of the procedures almost always offers the other. However, since laser treatment is non-invasive, whereas RLE is a full surgical procedure, RLE procedures require more staff. This also leads to a considerable difference in the allocation of costs of each procedure, with a higher proportion of the costs of RLE going to the surgeon and assisting staff performing the procedure and a smaller proportion going to equipment, while for refractive laser surgery, the reverse is true. As to the investment costs to establish capabilities to perform each procedure, the investment required to perform refractive laser surgery (excluding facilities and furniture) is estimated at between EUR 0.5 to 1.3 million, which notably includes the laser itself. In contrast, the investment costs required to perform RLE surgery is estimated to be around EUR 335,000. However, the Notifying Party submits that even though laser equipment are expensive, RLE facilities are more costly to operate since RLE surgery is a microsurgical procedure that requires a sterile environment, as well as a significant number of surgical and assisting staff.

Notifying Party's view

(37) To the best of the Notifying Party's knowledge, the Commission has not previously defined relevant markets in relation to ophthalmological eye surgeries, including RLE surgery.[28]

(38) The Notifying Party submits that the CMA previously considered that the implantation of intraocular lenses forms a distinct market which is separate from the refractive laser surgery market.[29] The implantation of intraocular lenses is a microsurgical procedure that requires sterile operating theatres which are more costly to operate than the facilities used for laser-based procedures. The implantation of intraocular lenses is therefore provided at fewer clinics than laser-based procedures.

(39) The Notifying Party also submits that eye surgery constitutes a product market on its own due to the distinct demand and supply side characteristics. Whether this market would form part of the broader optical retail market or the ambulatory surgical care market has not been determined by the Notifying Party in the absence of Commission precedents.[30]

(40) The Notifying Party also submits that, in line with the previous CMA decision,[31] the implantation of intraocular lenses treatments such as RLE is not part of the same relevant market as refractive laser based surgeries.[32] According to the Notifying Party, in Sweden and Norway, differences on the demand side (pricing, intended use of the procedure based on the condition of the patient's eye, age of target patients) and on the supply side (type of equipment and level of investment needed) point to each procedure constituting a separate product market.[33] Ultimately, the Notifying Party believes that the product market definition can be left open since even on the narrowest basis, no competitive concerns arise as a result of the Transaction.[34]

Commission's assessment

(41) As noted in paragraph 30 above, the Commission has not so far defined or considered relevant product markets for ophthalmological treatments and services, or more specifically for refractive laser surgery and RLE surgery. The Commission has

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28 As mentioned, in the view of the Notifying Party, the areas of their activities that give rise to overlaps as a result of the Transaction could potentially be seen as falling within two different broad product markets, namely (i) the markets for (refractive or reimbursed) ophthalmological ambulatory surgical care services, and (ii) the market for retail optical services (see Form CO, paragraph 74).

29 Case ME/5898/13 – *Optimax Clinics Unlimited/Ultralase Limited*, decision of the Office of Fair Trading of 29 July 2013, paragraphs 55-56.

30 Form CO, paragraph 92.

31 Case ME/5898/13 – *Optimax Clinics Unlimited/Ultralase Limited*, decision of the Office of Fair Trading of 29 July 2013, paragraphs 55-56.

32 Form CO, paragraph 145.

33 Form CO, paragraph 145: the Notifying Party also explained that the Parties typically internally monitor each of refractive laser surgeries and RLE procedures separately.

34 Form CO, paragraph 147.

considered in previous decisions a distinction between different specialist medical departments.[35]

(42) For the same reasons as those set forth in paragraphs 29 to 33 above, the Commission considers that plausible product market definitions for the purpose of assessing the likely impact of the Transaction on competition include ophthalmological treatments and services and, at the narrowest level, treatments for specific conditions, such as RLE surgery, or combinations thereof.

Conclusion

(43) For the purpose of the present decision, the Commission considers that the exact product market definition for RLE surgery can be left open since the Transaction does not raise serious doubts as to its compatibility with the internal market irrespective of the alternative market definition considered.

(44) Hence, the Commission has carried out its assessment based on a product market defined at the level of each of refractive laser surgery and RLE surgery, as well as a combination of both (referred to as the market for ophthalmological treatments). Likewise, as regards the RLE surgery segment, the Commission will also assess the competitive impact of the Transaction on a potentially broader market covering different treatment procedures similar to RLE for the implantation of intraocular lenses (i.e. including, apart from RLE, also cataract surgery and cataract top-up surgery).

4.3. Relevant geographic markets

(45) In previous decisions dealing with the overall retail optical market, the Commission considered the geographic market to be national in scope but eventually left the relevant market definition open.[36]

(46) The Commission has previously considered that the market for private hospitals was not broader than national in scope but left the precise scope of the geographic market open.[37] In previous decisions relating to acute hospital services, the Commission has left open whether the market was national or narrower in scope.[38]

(47) In previous decisions concerning the provision of diagnostic and hospital care services, the Commission considered a local scope for the provision of hospital care services extending over a radius of a 30-minute car drive around the institution considered, but had ultimately left open the geographical scope.[39]

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35 Commission decision of 4 August 2014 in Case M.7309 – *Bridepoint / EdRCP*, paragraph 24; Commission decision of 16 October 2018 in Case M.9128 – *Vivalto Santé / Groupe Capio France*, paragraph 16.

36 Commission decision of 1 March 2018 in Case M.8394 – *Essilor/Luxottica*, paragraph 175.

37 Commission decision of 21 August 2007 in Case M.4788 – *Rozier/BHS*, paragraphs 14 and 16.

38 Commission decision of 25 July 2006 in Case M.4229 – *APHL / L&R / Netcare General Healthcare Group,* paragraphs 38-39.

39 Commission decision of 14 December 2015 in Case M.7833 – *CDC International Capital / Mubadala Development Company / Vivalto Bel / Group Vivalto Santé*, paragraph 21; Commission decision of 28 April 2014 in Case M.7221 – *Bridgepoint Capital / Médi-Partenaires*, paragraph 26.

Notifying Party's view

(48) The Notifying Party submits that, in its experience, the key drivers of supply and demand are national in scope. It therefore views the relevant markets as being national, i.e., Sweden and Norway.[40]

(49) The Notifying Party also mentions that the CMA previously assessed the overall retail optical market at a UK-wide level and at the level of narrower local markets.[41] For the purposes of assessing local markets, the CMA considered that the average distance travelled by optical retail customers ranges from 10 miles to 60 miles (i.e. approximately 16 km to 100 km).[42]

Commission's assessment

(50) As part of its market investigation, the Commission inquired into the distance that patients are typically willing to travel in both Sweden and Norway to undergo refractive ophthalmological treatment and surgery.

(51) The outcome of the market investigation consistently points to a smaller-than-national geographic dimension, limited to a catchment area around the Parties' clinics. The majority of respondents who expressed an opinion on this point considered that, in urban areas, patients typically consider the clinics offering at city level or at most within a catchment area limited to a distance of up to 100 km around the city in question. For example, one respondent indicated that 85% of patients either choose from the various clinics at city level (60%) or decide to travel locally up to 100 km (25%).

(52) However, the market investigation also revealed that the size of the catchment area might depend on the region within Sweden or Norway. In particular, patients located in remote, less populated areas of both Sweden and Norway are typically willing to travel longer distances to reach the clinic of their choice, beyond 100 km and possibly up to 200 or even 300 km.

(53) As one respondent pointed out: "*patients in the major cities are used to get all kinds of services in their own town and are not that likely to travel for their treatment. Patients from other parts of Sweden are more willing to travel to undergo refractive surgery*".[43] Another respondent provided similar indications as regards Norway, distinguishing between city centres and "*inhabitants in the northern part of the country*".[44]

Conclusion

(54) For the purpose of this decision, the exact geographic market definition can be left open since the Transaction does not raise serious doubts as to its compatibility with

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40 Form CO, paragraphs 164 and 180: with very few exceptions that have a more localised elements.

41 Case ME/5898/13 – *Optimax Clinics Unlimited/Ultralase Limited*, decision of the Office of Fair Trading of 29 July 2013, paragraphs 72-75, 79 and 83.

42 Case ME/5898/13 – *Optimax Clinics Unlimited/Ultralase Limited*, decision of the Office of Fair Trading of 29 July 2013, paragraph 79.

43 Non-confidential reply of a customer to request for information dated 2 July 2021, question 2.

44 Non-confidential reply of a customer to request for information dated 2 July 2021, question 2.

the internal market irrespective of the alternative geographic definitions considered.[45]

(55) Hence, the Commission has carried out its competitive assessment at national level in the two countries where the Parties' activities overlap, namely Sweden and Norway. In addition, the Commission will provide its analysis on a potentially narrower relevant market limited to city level, as well as a catchment area of 100 km.

5. COMPETITIVE ASSESSMENT

(56) In view of the above, the following horizontal overlaps arising from the Transaction would result in affected markets both at national and local level:

- refractive laser surgery in Norway,
- RLE surgery in Norway, and
- RLE surgery in Sweden.

5.1. Refractive laser surgery in Norway[46]

Notifying Party's view

(57) In 2020, Memira performed […] refractive laser surgeries in Norway, which generated a total turnover of EUR […] million. According to the Notifying Party, Memira's 2020 market share by value was [50-60]%.[47] Aleris is a considerably smaller player in Norway as it performed only […] refractive laser surgeries in 2020, which generated a total revenue of EUR […].[48]

(58) Therefore, even though the combined market share of the Parties post-Transaction would amount to [50-60]%, the increment added by the market share of Aleris by value would be extremely limited, namely only [0-5]%.[49]

(59) The Notifying Party indicates that, in its view, given the very limited presence of Aleris as regards refractive laser surgery in Norway, it can in fact be hardly considered as a credible competitor to Memira.[50]

(60) In addition, according to the Notifying Party, post-Transaction there will remain a number of competitors offering similar services in Norway, including Argus Syn/Volvat/Capio, Volvat ORBITA / Capio, ABC Synskirurgi, Oslo Øyelegesenter, Optera Bergen and others.

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45 See section 5.

46 Form CO, paragraph 193 and Tables 17, 18 and 19: the Notifying Party submits that Aleris (Triton) is not active in this segment in Sweden (and has not been active in 2018 and 2019), therefore there is no overlap in this segment in Sweden.

47 Form CO, Table 20.

48 Form CO, Table 20.

49 Form CO, Table 20.

50 Form CO, paragraph 195.

(61) When considering a broader product market including refractive laser surgery and RLE surgery in Norway, based on the 2020 market share data by value provided by the Notifying Party, the Parties' combined position would be [50-60]% with a *de minimis* increment of only [0-5]%.[51] Indeed, Aleris performed only […] surgeries in 2020, which generated a total revenue of EUR […].[52]

(62) The Notifying Party's view is that the Transaction is therefore also unlikely to give rise to concerns on a broader product market including refractive laser surgery and RLE surgery in Norway.

(63) Finally, the Notifying Party argues that no competition concerns can be expected to arise even when considering narrower local markets within Norway.[53] Indeed, even at the level of a catchment area covering Oslo city only or a 100 km radius around Oslo, the Parties would hold a combined share of [50-60]% and [40-50]%, respectively, but Aleris would only add a *de minimis* increment of [0-5]% as it operates a single clinic in the area generating a very limited turnover in the market for ophthalmological treatments.[54] Furthermore, the Notifying Party argues that there will continue to be a number of other clinics providing refractive eye surgery services in and around Oslo.[55]

Commission's assessment

(64) In line with the market shares and revenue figures submitted by the Notifying Party, the Commission understands that Aleris has indeed a limited presence in Norway with only one single clinic located in Oslo city.

(65) In addition, the vast majority of respondents to the market investigation confirmed that, post-Transaction, patients would still have sufficient alternatives left in Norway in general and in Oslo specifically, for refractive laser surgery on its own or in combination with RLE surgery, and that the Transaction would not materially affect the market conditions or lead to increased prices or reduced capacity.

(66) One respondent indicated that the Transaction "*will only be a name shift and no real change in the competitive situation*"[56] will arise post-Transaction. This respondent also pointed that "*although Aleris and Memira* [have] *some overlapping activities, the main bulk of* (…) *refractive laser surgeries has so far been performed by Memira*" which excludes any "*danger of reduced capacity as a result of this*

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51 Form CO, Table 12.

52 Form CO, Table 12.

53 Form CO, paragraphs 229-230: in order to determine the catchment area of each location, the Notifying Party identified the catchment area as the area from which a large majority (approximately 80%) of their customers reside. The Parties indicated a maximum radial range of 100 km around each location as the likely maximum distance a patient would travel to access ophthalmological services. That said, according to the Notifying Party, patients residing in more urban areas where sufficient choice for ophthalmological services exists in a narrower geographic area, may be more predisposed to seeking out providers closer to their residence, leading to catchment areas that would be less than 100 km.

54 Form CO, paragraphs 249, 254-255 and 259.

55 Form CO, paragraphs 253, 257, Table 64 and Table 65: the Notifying Party submits that there are 8 competitors within the Oslo (100 km) catchment area and 5 competitor locations in Oslo city alone.

56 Non-confidential reply of a competitor to request for information dated 12 July 2021, question 3.

merger"[57]. Another respondent confirmed that the Transaction would not "*influence the patient's alternative on a national basis*".[58]

(67) The limited concerns that were raised as regards refractive laser surgery in Norway relate to Memira's current leading market position and do not therefore appear to be merger-specific in nature.

(68) In view of the above and the information obtained over the course of the market investigation, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to refractive laser surgery in Norway, including the city of or local 100 km catchment area around Oslo, as well as on a broader market including both refractive laser surgery and RLE surgery.

5.2. RLE surgery in Norway

Notifying Party's view

(69) In 2020, Memira performed […] RLE surgeries in Norway, which generated a total turnover of approximately EUR […] million. According to the Notifying Party, Memira's 2020 market share by value was [50-60]%.[59] Aleris is a considerably smaller player in Norway as it performed only […] RLE surgeries in 2020, which generated a total revenue of EUR […].[60]

(70) Therefore, even though the combined market share of the Parties post-Transaction would amount to [50-60]%, the increment added by Aleris would be extremely limited, namely only [0-5]%.[61]

(71) The Notifying Party indicates that, in its view, given the very limited presence of Aleris in the RLE surgery segment, it can in fact hardly be considered as a credible competitor to Memira in Norway.[62]

(72) According to the Notifying Party, post-Transaction there will remain a number of competitors offering similar services in Norway, including Argus Syn/Volvat/Capio, Volvat ORBITA / Capio, ABC Synskirurgi, Oslo Øyelegesenter, Optera Bergen and others.

(73) The Parties only overlap in the broader implantation of intraocular lenses treatment procedures product market in Norway solely based on their activity in RLE.[63] Nonetheless, when considering a broader market including different implantation of intraocular lenses treatment procedures (i.e. RLE, cataract surgery and cataract top-

57 Non-confidential reply of a competitor to request for information dated 12 July 2021, question 1.
58 Non-confidential reply of a competitor to request for information dated 12 July 2021, question 1.
59 Form CO, Table 38.
60 Form CO, Table 38.
61 Form CO, Table 38.
62 Form CO, paragraph 209.
63 Form CO, paragraph 208.

up surgery), the Parties' combined market shares in Norway would be [10-20]% in 2020 and would not give rise to an affected market.[64]

(74) The Notifying Party's view is that the Transaction is therefore also unlikely to give rise to concerns on a broader market including different implantation of intraocular lenses treatment procedures in Norway.

(75) Finally, the Notifying Party argues that no competition concerns can be expected to arise even when considering local markets within Norway. Indeed, even at the level of a catchment area covering Oslo city only or a 100 km radius around Oslo, the Parties would hold a combined share of [50-60]% and [40-50]%, respectively, but Aleris would only add a *de minimis* increment of [0-5]% as it operates a single clinic in the area generating a very limited turnover in the market for ophthalmological treatments.[65] Furthermore, the Notifying Party argues that there will continue to be a number of other clinics providing RLE surgery services in or around Oslo.[66]

Commission's assessment

(76) The Commission understands that Aleris has a limited presence in Norway for RLE surgery, with only one single clinic located in Oslo city.

(77) In addition, the vast majority of respondents to the market investigation confirmed that, post-Transaction, patients would still have sufficient alternatives left in Norway in general and in Oslo specifically, for RLE surgery on its own or in combination with refractive laser surgery and that the Transaction would not materially affect the market conditions or lead to increased prices or reduced capacity, including on a broader market covering different treatment procedures for the implantation of intraocular lenses in Norway.

(78) The limited concerns that were raised as regards RLE surgery in Norway relate to Memira's current leading market position and therefore do not therefore appear to be merger-specific in nature.

(79) In view of the above and the information obtained over the course of the market investigation, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to RLE surgery in Norway, including the city of or local 100 km catchment area around Oslo, as well as on broader markets including both RLE surgery and refractive laser surgery or RLE surgery together with different implantation of intraocular lenses treatment procedures.

5.3. RLE surgery in Sweden

Notifying Party's view

(80) In 2020, Memira performed […] RLE surgeries in Sweden, which generated a total turnover of approximately EUR […] million. According to the Notifying Party,

64 Form CO, Table 35.

65 Form CO, paragraphs 249, 254-255 and 259.

66 Form CO, paragraphs 253, 257, Table 64 and Table 65: the Notifying Party submits that there are 8 competitors within the Oslo (100 km) catchment area and 5 competitor locations in Oslo city alone.

Memira's 2020 market share by value was [40-50]%.[67] Aleris is a considerably smaller player in Sweden as it performed only […] RLE surgeries in 2020, which generated a total revenue of EUR […].[68]

(81) Therefore, even though the combined market share of the Parties post-Transaction would be [40-50]%, the increment added by Aleris would be extremely limited, namely only [0-5]%.[69]

(82) The Notifying Party indicated that, in its view, given the very limited presence of Aleris in the RLE surgery segment, it can in fact hardly be considered as a credible competitor to Memira in Sweden.[70]

(83) According to the Notifying Party, post-Transaction there will remain a number of competitors offering similar services in Sweden, including Capio, Varda Ögon, Ögonlasern, Novius Ögonklinik, Aveny Ögonklinik, Lirema, Proforma Clinic, Stockholms Ögonklinik and others.

(84) When considering a broader product market including both refractive laser surgery and RLE surgery in Sweden, based on the 2020 market share data by value provided by the Notifying Party, the Parties' combined position would be [40-50]% with a *de minimis* increment of only [0-5]%.[71] Indeed, Aleris is not active in the refractive laser surgery segment in Sweden[72] and performed only […] RLE surgeries in 2020, which generated revenue of EUR […] in total.[73]

(85) The Notifying Party's view is that the Transaction is therefore also unlikely to give rise to concerns on a broader product market including refractive laser surgery and RLE surgery in Sweden.

(86) In addition, when considering a broader market including different implantation of intraocular lenses treatment procedures (i.e. RLE, cataract surgery and cataract top-up surgery),[74] the Parties' combined market shares in Sweden would be [10-20]% and would not give rise to an affected market.[75]

(87) Finally, according to the Notifying Party, no competition concerns can be expected to arise when considering local markets within Sweden. Indeed, even at the level of a catchment area covering Stockholm city only or a radius of 100 km around Stockholm, the Parties would only hold a combined share of [20-30]% and [20-30]%, respectively, on the market for ophthalmological treatments.[76]

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67 Form CO, Table 32.

68 Form CO, Table 32.

69 Form CO, Table 32.

70 Form CO, paragraphs 206-207.

71 Form CO, Table 11.

72 Form CO, Table 20.

73 Form CO, Table 11.

74 Form CO, paragraphs 203 and 204: the Notifying Party confirmed that with respect to (i) cataract surgery and (ii) cataract top-up surgery in Sweden the Parties' combined market shares would be below 20% and would not give rise to any affected markets.

75 Form CO, Table 23.

76 Form CO, paragraphs 240 and 244.

Furthermore, the Notifying Party argues that there will continue to be a number of other clinics providing RLE surgery services in or around Stockholm.[77]

Commission's assessment

(88) In line with the market shares and revenue figures submitted by the Notifying Party, the Commission understands that Aleris has limited RLE surgery activities in Sweden and overall a presence significantly more limited than Memira. Indeed, Aleris only operates 8 clinics throughout Sweden (as opposed to 30 for Memira), only one of which is active in the RLE segment in Stockholm city and to a very limited extent.

(89) In addition, the vast majority of respondents to the market investigation confirmed that, post-Transaction, patients would still have sufficient alternatives left in Sweden in general and in Stockholm specifically, for RLE surgery on its own or in combination with refractive laser surgery, and that the Transaction would not materially affect the market conditions or lead to increased prices or reduced capacity, including on a broader market covering different treatment procedures for the implantation of intraocular lenses in Norway.

(90) One respondent indicated that post-Transaction "there *will be no difference compared to the current situation. Memira is the dominant player and the transaction will not change that*"[78] in terms of "*prices, quality or choice for* (…) *patients. Aleris' business in refractive surgery is currently not that large so it does not affect the total market to any appreciable extent*".[79] Another respondent confirmed that "*Memira already today owns the refractive market. A closer relationship with Aleris will not change the competition in terms of market shares*".[80] As regards the Stockholm area, another respondent confirmed that "*patients in the greater Stockholm area will not have a problem finding other eye clinics than Aleris and Memira*".[81]

(91) The limited concerns that were raised as regards RLE surgery in Sweden relate to Memira's current leading market position and do not therefore appear to be merger-specific in nature.

(92) In view of the above and the information obtained over the course of the market investigation, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to RLE surgery in Sweden, including at the level of the city of or a 100 km radius around Stockholm, as well as on broader markets including both RLE surgery and refractive laser surgery or RLE surgery together with different implantation of intraocular lenses treatment procedures.

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77 Form CO, paragraphs 237, 244, Table 57 and Table 61: the Notifying Party submits that there are 28 competitors within the Uppsala/Stockholm area (100 km) and 14 competitor locations in Stockholm city alone.

78 Non-confidential reply of a customer to request for information dated 2 July 2021, question 1.

79 Non-confidential reply of a customer to request for information dated 2 July 2021, question 3.

80 Non-confidential reply of a competitor to request for information dated 2 July 2021, question 1.

81 Non-confidential reply of a competitor to request for information dated 2 July 2021, question 1.

6. CONCLUSION

(93) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President