

# Anticipated acquisition by Reckitt Benckiser of the K-Y brand from Johnson & Johnson

**ME/6448/14**

The CMA’s decision on reference under section 33(1) of the Enterprise Act 2002 given on 19 December 2014. Full text of the decision published on 29 January 2015.

**Please note that [X] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.**

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## SUMMARY

1. Reckitt Benckiser Group plc (**RB**) has agreed to acquire the K-Y brand and related assets (**K-Y**) from Johnson & Johnson (**J&J**) (the **Merger**). RB and K-Y are together referred to as the **Parties**.
2. The Competition and Markets Authority (**CMA**) considers that the Parties will cease to be distinct as a result of the Merger, that the share of supply test is met and that accordingly arrangements are in progress or in contemplation

which, if carried into effect, will result in the creation of a relevant merger situation.

3. The Parties overlap in the supply of personal lubricants in the UK. RB supplies the K-Y brand and J&J supplies a range of personal lubricants under the Durex brand together with other sexual well-being products (eg condoms, personal massage oils). The CMA found that there were distinct sales channels for sales of personal lubricants including supply to:
  - (a) grocery retailers and national pharmacy chains in the UK;
  - (b) online retailers;
  - (c) specialist adult retailers; and
  - (d) independent pharmacies.
4. In the grocery retail and national pharmacy chain channel, the CMA found that the parties have a high market share of around 80-90% representing around [70-80]% of the value of K-Y sales in the UK and [70-80]% of the value of Durex's personal lubricant sales in the UK. Other brands had limited or no share of sales in this channel.
5. The CMA, based on the evidence available to it, found that Durex and K-Y are close competitors in this channel. In grocery retailers, even though the products are differentiated in terms of branding and marketing, the Parties' brands are often the only two products offered. In national pharmacy chains, they remain the majority of the products stocked and sold through those stores. In addition, both brands enjoy high levels of brand awareness and the evidence available to the CMA suggests that customers switch between some of Durex's personal lubricants and K-Y Jelly to at least some extent.
6. The CMA did not consider that other suppliers of branded personal lubricants will sufficiently constrain RB post-Merger. It also found that any constraint from private label products is not uniform across grocery retailers.
7. The CMA considers that the Merger may shift bargaining power in RB's favour in its negotiations with grocery retailers and national pharmacy chains given that RB would account for an even greater proportion of the lubricants sold by these retailers and would be the only supplier of branded lubricant products to grocery retailers. Some third parties expressed concerns about the impact of the Merger on their ability to negotiate with the Parties.
8. The CMA also considered whether the Merger would lead to the loss of potential competition resulting in the removal of the possibility of expansion of

the K-Y brand of personal lubricants in the UK. It has not found it necessary to conclude on this given its findings in relation to current competition.

9. The CMA considers that the constraints the Parties face from independent pharmacies, online and specialist adult retailers, taken together, are insufficient to prevent the Merger from giving rise to a realistic prospect of a substantial lessening of competition (**SLC**) in relation to the supply of personal lubricants to grocery retailers and national pharmacy chains in the UK.
10. Based on the evidence available to it, the CMA found that any potential entry or expansion of other suppliers of personal lubricants into grocery retailers and national pharmacy chains would not be timely, likely and sufficient to prevent a realistic prospect of an SLC from arising. Further, the CMA found that there is insufficient evidence of buyer power to constrain RB post-Merger and prevent competitive harm from arising.
11. Therefore, the Merger may give RB an increased incentive to raise prices or worsen other elements of its offer, including in relation to quality or innovation. The CMA therefore considers that the Merger gives rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects.
12. The CMA considered whether it should exercise the markets of insufficient importance exception in this case. However, having taken account of all relevant factors, the CMA considers that, on balance, it is not appropriate to exercise its '*de minimis*' discretion in this case.
13. Nonetheless, instead of making a reference for an in-depth Phase 2 investigation, the CMA is able to accept undertakings from merger parties to take such action as the CMA considers appropriate under section 73 of the Act. The Parties have until 30 December 2014 to offer undertakings to the CMA which might be accepted by the CMA in lieu of making a reference. If no such undertaking is offered, then the CMA will refer the merger pursuant to sections 33(1) and 34ZA(2) of the Act.

## **ASSESSMENT**

### **Parties**

14. RB is a global consumer goods company, headquartered in the UK, which manufactures and sells a range of health, hygiene, home, food, and pharmaceutical products with operations in 66 countries worldwide. It has 106 brands, including the Durex brand. Durex's product range consists of condoms, personal lubricants and other intimate enhancement products (such

as pleasure toys). RB's worldwide turnover for 2013 was £10,043 million, of which £[REDACTED] million was generated in the UK.

15. The K-Y brand is owned by McNeil-PPC Inc., a subsidiary of J&J headquartered in New Jersey, USA. J&J is the ultimate parent of a global group of companies with more than 100 brands and with operations in more than 60 countries. McNeil-PPC belongs to the Consumer Healthcare division of J&J. In the UK, J&J supplies only its basic 'K-Y Jelly' product whereas in other jurisdictions, other products are supplied under the K-Y brand.

## Transaction

16. RB and McNeil-PPC Inc. entered into an asset purchase agreement on 10 March 2014, pursuant to which RB agreed to purchase, and McNeil-PPC agreed to sell, the rights, liabilities, and assets relating to K-Y. The assets being acquired include inventories, moulds, certain IP rights and data, designs, specifications, and other documents and contracts relating to the K-Y brand.
17. Internal documents suggest that RB's rationale for the Merger is for K-Y to become [REDACTED].<sup>1</sup>
18. The Merger has completed in a number of jurisdictions worldwide. The Merger received merger control clearance in the USA, Australia, Brazil, Colombia, and Argentina and is being reviewed by the Commerce Commission in New Zealand. Completion of the Merger in the UK is conditional on UK merger control clearance. The CMA understands that no assets have been transferred that are directly or indirectly related to the UK business.

## Jurisdiction

19. RB and the assets associated with the K-Y brand (the **Parties**) are 'enterprises'.<sup>2</sup> The CMA considers that the K-Y brands and associated assets that are being transferred to RB enable the business activity associated with the K-Y brand to be continued by RB.
20. As a result of the Merger, the enterprises of RB and K-Y will cease to be distinct.

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<sup>1</sup> [REDACTED]

<sup>2</sup> See section 129 of the Act and paragraph 4.8 of the [Mergers: Guidance on the CMA's jurisdiction and procedure](#).

21. The Parties overlap in the supply of personal lubricants in the UK, where they have a combined share of supply in excess of 25%. The CMA therefore considers that the share of supply test in section 23 of the Act is met.
22. The CMA therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
23. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 28 October 2014 and the statutory 40 working-day deadline for a decision is therefore 22 December 2014.

## Counterfactual

24. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For anticipated mergers the CMA generally adopts the prevailing conditions of competition as the counterfactual against which to assess the impact of the merger. However, the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it considers that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions.
25. The parties did not put forward any alternative counterfactual in this case. The CMA considers the prevailing conditions of competition to be the relevant counterfactual. The CMA has assessed the loss of potential competition which may flow from the Merger in the competitive assessment.<sup>3</sup>

## Background

26. Personal lubricants fall within a wider 'sexual well-being' category which includes condoms, body and massage oils, and related products.
27. The main dimension of differentiation is their marketing position as 'functional' personal lubricants, with a stronger focus on medicinal aspects, or 'pleasure enhancement' personal lubricants, with a stronger focus on sexual aspects.
28. The Parties submitted that K-Y Jelly was a 'functional lubricant' and most of the Durex range would fall into the 'pleasure enhancing' segment. This brand

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<sup>3</sup> As indicated in the [Merger Assessment Guidelines](#) (paragraphs 4.3.19 and 5.4.15) the loss of a potential entrant may alternatively be assessed by considering that entry would have resulted in a more competitive counterfactual than the prevailing conditions of competition.

differentiation is confirmed by the Parties' internal documents and by third parties (see paragraphs 138 to 158).

29. Table 1 below summarises the range of personal lubricants supplied by the Parties in the UK. RB supplies a wider range of personal lubricants in the UK than J&J.

**Table 1: Overview of personal lubricants supplied by the parties in the UK**

Personal lubricants	K-Y	Durex
Functional lubricant	K-Y Jelly (50ml, 75ml, 82g)	
		Play Feel (60ml)
Pleasure enhancing lubricant		Play Aloe Vera (60ml)
		Warming (60ml)
		Tingle (60ml)
		Very Cherry (60ml)
		Sweet Strawberry (60ml)
		Passion Fruit (60ml)
		Soothing Massage 2in1 (200ml)
		Sensual Massage 2in1 (200ml)
		Stimulating Massage 2in1 (200ml)
		Embrace (2x60ml)
		Play O (15ml)
		Perfect Glide (50ml)

Source: the Parties

30. Personal lubricants are made available to end-consumers in the UK through different channels, namely grocery retailers, national pharmacy chains (ie Boots, Lloyds and Superdrug),<sup>4</sup> specialist adult retailers, independent pharmacies, and online retailers.

## Frame of reference

31. The CMA considers that market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as it is recognised that there can be constraints on merger parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more

<sup>4</sup> In its decision in *UniChem Plc/Lloyds Chemists Plc and GEHE AG/Lloyds Chemists Plc* (1996) the Monopolies and Mergers Commission (MMC) identified four broad categories of pharmacies: 'neighbourhood pharmacies, high street pharmacies, health centre pharmacies and pharmacies located in supermarkets' (see paragraph 4.85). In this decision, 'high street pharmacies' were 'characterised by high footfall and a large range of non-pharmaceutical products'. More recently the OFT used the terminology 'national pharmacy chains' with similar meaning of 'high street pharmacies' to refer to Boots and Lloyds (See paragraph 31 of the OFT's decision on the case *Boots/Alliance UniChem*, 2006). In the CMA's report regarding the Omnicell/MTS acquisition of SurgiChem (2014), the CMA also distinguished between 'large pharmacy chains' and other pharmacies, based on the fact that the former held a formal tender in order to appoint suppliers of adherence packaging. For the purpose of this decision, the CMA uses the terminology 'national pharmacy chains' to refer to Boots, Lloyds and Superdrug.

important than others. The CMA takes these factors into account in its competitive assessment.<sup>5</sup>

### ***Product scope***

32. As mentioned above in paragraph 3, the Parties overlap in the supply of personal lubricants in the UK. The CMA has considered whether the supply of personal lubricants should be further segmented by product type or sales channel (ie customer type).

### ***Segmentation by product type***

33. The Parties submitted that there is a single frame of reference for the supply of personal lubricants and do not segment this market based on the type of product.
34. The Parties have conducted a number of price correlation analyses between a selected number of Durex products, K-Y Jelly and competing products, in the period between February 2011 and February 2014. The different analyses conducted by the Parties comprise:
- (a) Price correlation between the retail prices of Durex Play Feel, Durex Sweet Strawberry, and K-Y Jelly;
  - (b) Price correlation between the retail prices of Durex Play Feel, K-Y Jelly, and Durex Sensilube;
  - (c) Price correlation between the retail price of K-Y Jelly and the average price of the Durex pleasure enhancement range;
  - (d) Price correlation between the retail price of Durex Play Feel and the average price of private label lubricants;
  - (e) Price correlation between the retail price of Numark (a private label moisturiser) and K-Y Jelly.
35. The CMA took these price correlation analyses into account in its assessment of the product frame of reference and of closeness of competition between the Parties.
36. On the demand side, most retailers told the CMA that there is a spectrum of personal lubricants ranging from 'functional' lubricants to 'pleasure enhancement' personal lubricants, while other retailers stated that personal

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<sup>5</sup> [Merger Assessment Guidelines](#), paragraph 5.2.2.

lubricants have similar functional properties and that their differentiation is based on marketing and product positioning, which does not determine or confine their use.

37. Other evidence suggests that some customers perceive some lubricants of different types as interchangeable (see the discussion below in paragraphs 137 to 170 relating to third party submissions and internal documents, such as J&J's presentation [redacted]). The CMA has also received some evidence of customers switching between some personal lubricants of the Durex range and K-Y Jelly (see J&J's presentation [redacted] and the analysis of [redacted]'s sales data, mentioned below in paragraphs 149 and 160).
38. Based on the evidence mentioned above, the CMA considers that end-consumers may respond to a price rise in 'functional' lubricants by switching to 'pleasure enhancement' personal lubricants products and vice-versa to such an extent that the price increase by the hypothetical monopolist would not be profitable.
39. This suggests that there is a significant degree of demand-side substitutability across most types of personal lubricants and the product frame of reference should not be narrowed based on the different marketing positioning of personal lubricants.

#### *Personal lubricants vs vaginal moisturisers*

40. The CMA considered whether vaginal moisturisers should be added to the product frame of reference.
41. The Parties appear to consider vaginal moisturisers as a category of personal lubricants. They submitted that 'Sensilube' – a vaginal moisturiser supplied by RB – was a closer competitor of K-Y than other products of the Durex range.
42. Likewise, there is some reference in an internal document of one party which suggests that end-consumers consider vaginal moisturisers such as Replens as substitutes to K-Y.<sup>6</sup>
43. Set against this, the responses from third parties indicated that retailers perceive personal lubricants and vaginal moisturisers as two distinct product categories. Vaginal moisturisers, such as Replens, Balance Activ and Sylk, were not specified by third party retailers as personal lubricants they offered for sale at their stores.

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<sup>6</sup> [redacted].

44. A third party also distinguished vaginal moisturisers such as Sensilube from personal lubricants in terms of its properties, function and positioning in store.
45. The CMA also notes that, based on information submitted by the Parties, the retail price of vaginal moisturisers is on average between 3 to 7 times higher than the average retail price of Durex pleasure enhancement range and K-Y. The Parties stated that this price difference indicates that 'these moisturiser products are differentiated from the rest of the lubricant market'.
46. Based on the above evidence, the CMA, on a cautious basis, did not include vaginal moisturisers in the same frame of reference as personal lubricants, but considered the constraints that such moisturisers may exert on Durex and K-Y in the competitive assessment.

#### *Conclusion*

47. The CMA considers that consumers tend to switch between different types and brands of personal lubricants.
48. The CMA, on a cautious basis, does not include vaginal moisturisers in its product frame of reference.
49. The CMA therefore considers that the frame of reference should include all personal lubricants with no distinction between brands.

#### *Branded products vs private-label products*

50. The CMA assessed whether private label personal lubricants form part of the same frame of reference as branded products.

#### *Parties' submissions*

51. The Parties submitted that a number of retailers (including Asda, Boots, Lloyds Pharmacy, Superdrug, and Tesco) offered their own 'enhanced' personal lubricants under their private label. They submitted that private label products competed closely with Durex and K-Y, as they were typically 'significantly cheaper than branded products, and they targeted customers of branded products through similar packaging, flavours, etc.'.
52. The Parties have provided a price correlation analysis between Durex Play Feel, K-Y Jelly and private label products (using aggregate data of private

label products), which suggests a statistically significant correlation between private label products and Durex Play Feel.<sup>7</sup>

53. The CMA assessed the constraint from private label products on a retailer-by-retailer basis. In line with previous decisional practice,<sup>8</sup> the CMA did not consider it appropriate to aggregate private label products as a single competitive constraint on the parties' brands.

*Third parties' submissions and internal documents*

54. The CMA has not received extensive evidence to show that branded and private label lubricants form part of the same product frame of reference. Some third party retailers stated that they manufacture and offer private label products in their stores. Only two retailers identified their private label products as competing closely with Durex. The majority of private label retailers told the CMA that private label lubricants do not pose significant constraints on branded lubricants. One grocery retailer has submitted, based on the analysis of its sales data, that switching between private label and branded lubricants may only occur when branded products are on promotion, but not vice versa. This suggests that private label lubricants do not place a strong constraint on branded products.
55. [REDACTED].<sup>9</sup>

*Conditions of competition*

56. Only a limited number of retailers (Boots, Asda, Tesco, Poundland, 99p Stores, and Superdrug) offer private label personal lubricants and therefore, the constraint that private label products might impose on the Parties is not uniform across all retailers.
57. The CMA notes that these retailers account for around 67% of the total sales of all personal lubricants (branded and private label) (based on Nielsen estimates) through grocery retailers and national pharmacy chains. In terms of market penetration, private label personal lubricants are not available in some of the major grocery retailers in the UK (Sainsbury's, Waitrose, Co-operative Group, Morrisons).
58. Even in those retailers which sell private label lubricants, their own products are not sold across the entirety of their estate. For example, private label

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<sup>7</sup> Durex Play Feel is a product of the Durex Play range which is part of RB's in the 'pleasure enhancement' products, but more basic than other products of the Durex Play range.

<sup>8</sup> See CMA (2014) *Associated British Foods Plc/Dorset Cereals Limited*.

<sup>9</sup> [REDACTED].

lubricants are not available in [20-30]% of [X] stores and in [10-20]% of [X] stores that stock personal lubricants. In addition, private label products account for less than [15-25]% of all personal lubricants sold in each of Tesco, Asda, and Boots.

#### *Price correlation analysis*

59. The parties submitted that the price correlation between the retail prices of Durex Play Feel, K-Y Jelly, and the average price of private label lubricants mentioned above in paragraph 34 is statistically significant and shows that there was some correlation between the prices of branded and private label products.
60. The CMA notes that this analysis is based on the price of Durex Play Feel, and the aggregated average price of several private label products. The CMA does not consider that the price correlation analysis provides any robust and observable conclusions on the extent of customer switching from branded to private label products for two main reasons.
61. First, the correlated data is based on the average price of all private label products offered in the UK and it is not possible to infer from this data any meaningful conclusions regarding the competitive constraint of *each* private label product on Durex and K-Y, because it is aggregating *different* private label products. These private label products may themselves be differentiated and such data also does not take into account the differences in the distribution and availability of private label products across grocery retailers and national pharmacy chains.
62. Second, the price correlation identified by the Parties between Durex Play Feel and the average price of private label lubricants is not particularly strong as the correlation coefficient is 0.31.<sup>10</sup>
63. The CMA also notes that the Parties have not conducted a price correlation analysis between K-Y and private label personal lubricants. Even if there is a statistically significant price correlation between Durex and private label products, the constraint that private labels exert on K-Y and Durex may be different. Therefore, the CMA cannot draw any inference on the constraint of private label products on K-Y from the Parties' price correlation analysis.

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<sup>10</sup> A correlation coefficient of 0.31 only shows a weak association between the movement of the prices of these products over the period considered in the analysis. A correlation coefficient of 1 would imply a perfect co-movement between the prices of two products, while a correlation coefficient of 0 would imply that the movement in the price of one product is not reflected in the movement of the price of the other product.

### *Third parties' sales data*

64. The CMA received evidence of sales data from a grocery retailer. [X]. The CMA accepts that consumers may switch from private label to branded personal lubricants when the latter are on promotion. However, this may be consistent with an asymmetric constraint from Durex or K-Y to the private label product rather than vice versa. In other words, it is not clear from this (or other evidence) the degree to which private label is a close substitute for Durex and K-Y.
65. [X] sales data submitted by the Parties shows that the number of customers of Durex personal lubricants who also bought the private label products is higher than the number of Durex customers that bought K-Y Jelly. However, a closer analysis of this data shows that the constraint that private label products impose on each of Durex and K-Y may be different and that private label products do not constrain all the Durex range of personal lubricants in the same way (see paragraphs 172 to 180).

### *Conclusion*

66. The CMA has not been provided with sufficient evidence to show that private label personal lubricants form part of the same product frame of reference as branded personal lubricants. As such, for the purposes of this decision and on the basis of the evidence available, the CMA has not found that private label personal lubricants form part of the same product frame of reference. Any constraint from private label personal lubricants have been taken into account in the CMA's competitive assessment.<sup>11</sup>

### *Segmentation by sales channel*

67. The CMA may consider individual distribution channels or customer groups separately if the effects of the Merger on competition to supply a distribution channel or group of customers may differ from its effects on other channels or groups of customers, and require a separate analysis.<sup>12</sup>

### *Parties' submissions*

68. The Parties submit that all sales channels for personal lubricants should be included in the same frame of reference.

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<sup>11</sup> The CMA has considered the combined market share of the Parties both including and excluding private label products (see paragraphs 127 and 129) and assessed the strength of the constraints that different types of personal lubricants may pose on each other in its competitive assessment (see paragraphs 183 to 187).

<sup>12</sup> [Merger Assessment Guidelines](#), paragraph 5.2.28.

69. On the supply-side, the Parties stated that:
- (a) Conditions of supply did not differ significantly between channels; and
  - (b) [redacted].
70. On the demand side, the Parties submitted that:
- (a) End-consumers were increasingly shopping ‘across multiple channels and online purchases (Amazon, eBay, and specialist stores) account for a significant number of sales (around 22% of all sales of personal lubricants in the UK)’.
  - (b) The results of a consumer survey conducted by IPSOS suggested that the purchase of personal lubricants was infrequent and a planned purchase,<sup>13</sup> with price-sensitive consumers visiting multiple channels before making their purchasing decision.
  - (c) Despite the potential stigma that some consumers may feel in visiting ‘bricks and mortar’ specialist adult retail stores, the products offered by some specialist adult retailers (eg Ann Summers) were also available online.
71. The Parties have submitted the results of a consumer survey conducted by IPSOS in 2014 (‘IPSOS Survey’) which indicates that 20% of 378 shoppers on a shopping mission to purchase lubricants in the offline channel had also purchased online within a three month period.

#### *CMA’s analysis*

- *Demand side*

72. The CMA considered whether the product frame of reference could be segmented between different supply channels.
73. First, the evidence available to the CMA indicates that the competitor set and the range of products available to end-consumers differ substantially between grocery retailers and national pharmacy chains on the one hand, and online

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<sup>13</sup> See the Parties’ submissions of 4 and 5 December. The CMA notes that the questionnaire used by IPSOS in the survey mentioned above include questions such as ‘*Did you already know before you entered the shop/ visited the website that you went to buy these products (if any) or did you decide to buy these products (if any) when you were already in the store/on the website, on this shopping trip?*’ and ‘*Which shops would you consider purchasing these products [including personal lubricants] from?*’. However, the Parties have not submitted the responses to these questions to the CMA. The Parties support their submission that the purchase of personal lubricants is planned in the responses to a question about the recognised ‘shopping mission’ that led to the purchase of personal lubricants. The Parties interpreted the ‘shopping missions’ of ‘stock up’; ‘when I’ve ran out at home’; ‘for a planned naughty session’; or ‘to be prepared/just in case’, as indicative of a planned purchase.

retailers, specialist adult retailers and independent pharmacies, on the other hand:

(a) The only branded personal lubricants available in grocery retailers and some national pharmacy chain stores are Durex and K-Y.<sup>14</sup> The range of personal lubricants available online and in specialist adult retailers is significantly broader and a wide range of brands can be ordered by consumers at independent pharmacies. Brands such as Yes Yes, Swoon and ID are available in specialist adult, online retailers, and to order in pharmacies. However, they are not available in grocery stores and have no or limited presence in national pharmacy chains' stores. For instance, Durex and K-Y are the only personal lubricants available in the majority of Boots stores.

(b) The Parties' share of supply is significantly higher in the grocery retail and national pharmacy chains than in the other channels.

74. Second, grocery retailers submitted that they see each other as close competitors and some have price-matching policies in relation to the prices of other groceries retailers. In contrast, most third party retailers submitted they do not perceive online retailers and specialist adult retailers as their competitors and do not usually monitor and price-match their offer of personal lubricants.

75. Third, the behaviour of end-consumers determines, to some extent, how the customers of the Parties (ie retailers) in the different channels compete. Evidence available to the CMA shows limited switching of end-consumers between the different sales channels and that end-consumers do not tend to purchase across channel, suggesting that the conditions of competition differ:

(a) Most retailers submitted that they consider it unlikely that their customers would switch to purchasing personal lubricant from an online retailer in response to a small but significant non-transitory increase in price (**SSNIP**). In particular, a grocery retailer stated that it '*would only expect to see a shift by customers to online retailers if the grocery sector prices became extremely uncompetitive*'. Another third party stated that, while grocery retailers and national pharmacy chains tend to have more promotions but maintain the recommended retail price, there is more choice online and it is possible to find different pack sizes and different prices for the same product.

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<sup>14</sup> As mentioned below in paragraph 184, Durex and K-Y are the only branded products available in [50-60]% of [ ] stores and [30-40]% of [ ] pharmacies.

- (b) All retailers that responded to the CMA's investigation submitted that they do not compete with specialist adult retailers. They also confirmed that most consumers would not switch from 'bricks and mortar' specialist adult retailers to other channels in response to a SSNIP.
- (c) Contrary to the submissions of the Parties that the purchase of personal lubricants is planned and that customers compare offerings between channels, a grocery retailer submitted, based on its its interpretation of its its sales data, that a *'customer who buys [personal lubricants] is likely to buy the product as a secondary product on impulse to a primary purchase for a family planning item eg condoms.'*
76. Finally, regarding the IPSOS survey mentioned above in paragraph 71, the CMA notes that the percentage of customers that have purchased personal lubricants both online and offline was calculated by reference to the whole of the offline channel. Therefore, the percentage of customers purchasing across online and offline channels includes customers of 'bricks and mortar' specialist adult stores who appear to be more inclined to buy across multiple channels, including online. Further, the IPSOS survey was conducted online, which may have led to an overrepresentation of people who are more inclined to shop online. The CMA usually considers that *'face-to-face and telephone interviews'* are *'more reliable than paper or online self-completion questionnaires'*.<sup>15</sup>
77. Weighing the results of the IPSOS survey in the context of the other evidence available – including the submissions of retailers on how they perceive competition with retailers in other channels and the behaviour of end-consumers – the CMA considers that, on balance, there is limited demand-side substitutability for end-consumers between, on the one hand, the online, specialist adult and independent pharmacies channels and, on the other hand, offline sales in grocery retailers and national pharmacy chains.
- *Supply side*
78. The boundaries of the product frame of market are generally determined by reference to demand-side substitution alone. However, the CMA assessed whether suppliers of personal lubricants in the online, specialist adult, and independent pharmacies channels would respond to a change in price in the supply of personal lubricants to grocery retailers and national pharmacy

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<sup>15</sup> See OFT (2011) *Good practice in the design and presentation of consumer survey evidence in merger inquiries*, paragraph 3.43.

chains and vice-versa to determine whether the different sales channels should be aggregated in the same frame of reference.<sup>16</sup>

79. On the supply side, the Parties' competitors stated that the conditions of supply to grocery retailers and national pharmacy chains are different from other channels.
80. First, competitors submitted that entry into the major grocery retail chains and national pharmacy chains is significantly more difficult than into other sales channels. High barriers in the former channel are caused by limited shelf-space, less focus on the personal lubricants category in grocery retailers and high brand loyalty, which reduces the ability for grocery retailers and pharmacy retail chains to switch suppliers.<sup>17</sup> Furthermore, there are significant costs associated with being listed by those retailers, including marketing and contributions to retailers (see below paragraphs 228 to 234).
81. Second, the specialist adult retailers and most online retailers are not supplied directly by the Parties, but by wholesalers. For instance, the Parties have joint business plans with the main retailers and the national pharmacy chains, which together account for around [75-85]% of the sales of the Parties by volume, but not with retailers in other channels, [REDACTED].
82. [REDACTED].<sup>18</sup>
83. [REDACTED].

### *Conclusion*

84. Overall, based on the evidence available, the CMA considers that, on balance, the demand-side and supply-side evidence points towards different conditions of competition prevailing amongst the supply channels set out above.

### *National pharmacy chains vs independent pharmacies*

85. As mentioned in footnote 4, national pharmacy chains have previously been 'characterised by high footfall and a large range of non-pharmaceutical products'.<sup>19</sup>

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<sup>16</sup> [Merger Assessment Guidelines](#), paragraph 5.2.17.

<sup>17</sup> As explained below in paragraph 241, grocery retailers and national pharmacy chains tend to optimise the limited shelf-space in their stores by listing the brands and products that customers search for, ie those with a high loyalty rate. As Durex and K-Y are 'must have' brands, with a high loyalty rate, grocery retailers and national pharmacy chains are unlikely to delist these brands to list other products.

<sup>18</sup> [REDACTED].

<sup>19</sup> See MMC (1996) *UniChem Plc/Lloyds Chemists Plc* and MMC (1996) *GEHE AG/Lloyds Chemists Plc*.

86. [REDACTED].<sup>20</sup>
87. [REDACTED].
88. Therefore, the CMA considers that national retail pharmacies and independent pharmacies are distinct and are considered separately for the purposes of the CMA's competitive analysis.

#### *Grocery retailers vs national pharmacy chains*

89. The CMA assessed whether, based on demand-side substitutability for end-consumers between grocery retailers and national pharmacy chains, and the different conditions of competition between these two retail customers, the frame of reference should be further segmented to distinguish between grocery retailers and national pharmacy chains.
90. Grocery retailers and national pharmacy chains submitted that they consider each other as competitors in relation to products within the sexual well-being category. Some grocery retailers submitted that they monitor and closely compete with national pharmacy chains in healthcare categories. This suggests that there is significant switching of end-consumers between these two retail customer groups.
91. The range of products and brands available in grocery retailers and national do not differ substantially. Although the range of branded personal lubricants available in national pharmacy chains tend to be wider than in grocery retailers, data provided by national pharmacy chains demonstrates that in a significant number of stores the only branded personal lubricants available are K-Y and Durex (see paragraph 184). The majority of stores of national pharmacy channels also offer private label products, which is an additional similarity between some grocery retailers and national pharmacy chains and a point of differentiation regarding other sales channels.
92. [REDACTED].
93. Finally, suppliers of personal lubricants face the same barriers, including the same level of investment, to be listed in grocery retailers and national pharmacy chains.
94. The CMA therefore considers that the frame of reference should not be further narrowed to distinguish between grocery retailers and national pharmacy chains.

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<sup>20</sup> [REDACTED].

### *Conclusion*

95. The CMA considers that there is limited evidence of consumers switching between different sales channels. On the supply side, the evidence available suggests that the conditions of competition differ between channels and that the grocery retailers and national pharmacy chains tend not to consider specialist adult stores and online retailers as their competitors.

### *Conclusion on product scope*

96. For the reasons set out above, on a cautious basis, the CMA has considered the impact of the Merger in the following product frames of reference:
- Supply of personal lubricants to grocery retailers and national pharmacy chains;
  - Supply of personal lubricants to online retailers;
  - Supply of personal lubricants to specialist adult retailers;
  - Supply of personal lubricants to independent pharmacies.

### ***Geographic scope***

#### *Parties submission*

97. The Parties submitted that the narrowest geographic market is national in scope. The Parties negotiate with retail customers and wholesalers on a national basis regarding most of their sales and the conditions of competition do not differ materially within the UK. Further, marketing and sales strategies as well as recommended retail prices are determined on a national basis. Finally, the Parties submitted that imports of personal lubricants from outside the UK are limited.

#### *Supply side*

98. The CMA considers that the contractual relationships between the Parties and grocery retailers and national pharmacy chains indicate that the geographic scope for products in this channel is no wider than the UK.
99. Suppliers of personal lubricants negotiate contracts with these retailers on a national basis. Wholesalers also tend to contract with the suppliers of personal lubricants to distribute their products at national level to specialist adult retailers, online retailers, and independent pharmacies. However, the boundaries of the supply of personal lubricants through the online channel

may be broader than national, without the need for a national distribution network.

100. The personal lubricants sold within the UK also need to comply with UK-specific regulations.

#### *Demand side*

101. On the demand side, the product offering of personal lubricants for each channel is identical across the UK but differs between the national jurisdictions. The market positions of Durex and K-Y are different across Member States of the European Union. Further, the level of imports and exports of personal lubricants is not substantial. For instance, only [1-10]% of K-Y is exported from the UK.
102. The sale price for these products to retailers is commonly determined on a UK-wide level.
103. [✂].
104. Regarding the online channel, in the light of elements such as language differences and costs and delays associated with placing international orders and the international distribution of individual packages, the CMA considers that there are still national elements to the supply of personal lubricants online. As the CMA's competition analysis would not differ depending on the supply of personal lubricants online having a national or wider than national geographic scope, the geographic dimension of the supply of personal lubricants online can be left open.

#### *Conclusion on geographic scope*

105. For the reasons set out above, the CMA has considered the impact of the Merger regarding all the product frames of reference on a UK-wide basis.

#### ***Conclusion on frame of reference***

106. For the reasons set out above, the CMA has considered the impact of the Merger on the basis of the following frames of reference:
  - Supply of personal lubricants to grocery retailers and national pharmacy chains in the UK;
  - Supply of personal lubricants to specialist adult retailers in the UK;
  - Supply of personal lubricants to independent pharmacies in the UK;

- Supply of personal lubricants to online retailers on at least a UK basis.
107. The CMA has focused its analysis on the impact of the Merger in the supply of personal lubricants to grocery retailers and national pharmacy chains in the UK, because it is in this channel that, compared to other channels: (i) the Parties have a significantly higher combined share of supply; (ii) there is a very limited number of other suppliers of branded lubricants; and (iii) barriers to entry are more significant.

## **Competitive assessment**

### ***Horizontal unilateral effects***

108. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or degrade quality on its own and without needing to coordinate with its rivals.<sup>21</sup> Horizontal unilateral effects are more likely when the merger parties are close competitors. The CMA assessed whether it is or may be the case that the Merger has resulted, or may be expected to result, in a substantial lessening of competition in relation to unilateral horizontal effects in the supply of personal lubricants in the UK (see paragraph 106).

### ***Supply of personal lubricants to online retailers***

109. The combined share of supply of the Parties in the supply of personal lubricants online in the UK, based on Euromonitor estimates, is [20-30]%.
110. Furthermore, in this channel, the Parties face the constraint from a significant number of competitors and the branded personal lubricant ID has a higher market share than each of Durex and K-Y.
111. The barriers to entry into this channel are relatively low. Third parties submitted that they were successfully able to start supplying personal lubricants online.
112. Accordingly, the CMA finds that the Merger does not give rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects in relation to the supply of personal lubricants to online retailers in the UK.

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<sup>21</sup> [Merger Assessment Guidelines](#), from paragraph 5.4.1.

### ***Supply of personal lubricants to specialist adult retailers***

113. The combined share of supply of the Parties in the supply of personal lubricants to specialist adult retailers in the UK, based on Euromonitor estimates, is [20-30] %.
114. RB and J&J supply specialist adult retailers through wholesalers.
115. In this channel, the Parties face the constraint from a significant number of competitors, and the branded personal lubricants ID and Sylk each have a higher market share than Durex.
116. The barriers to entry into this channel are relatively low and less significant compared with the supply of personal lubricants to grocery retailers and national pharmacy chains.
117. Accordingly, the CMA finds that the Merger does not give rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects in relation to the supply of personal lubricants to specialist adult retailers in the UK.

### ***Supply of personal lubricants to independent pharmacies***

118. Independent pharmacies are supplied by the Parties via wholesalers, not directly. There is a significant number of wholesalers supplying independent pharmacies and some of them distribute brands of personal lubricants other than Durex and K-Y.
119. Wholesalers supplying independent pharmacies submitted to the CMA that their revenue is based on a fixed discount by reference to the retail recommended price or sales commission. Wholesalers therefore do not usually determine the sale price to independent pharmacies.
120. Third parties submitted that Durex and K-Y are the only lubricants on the shelf of some independent pharmacies. However, consumers can and do order other brands of personal lubricants at the counter of pharmacies. Therefore, a wider range of personal lubricants can be and are ordered by customers in independent pharmacies.
121. Furthermore, [redacted] independent pharmacies tend to focus on 'medicinal' products.<sup>22</sup>

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<sup>22</sup> [redacted].

122. [X]<sup>23</sup> suggests that independent pharmacies are not an usual destination for the purchase of sexual well-being products and that they represent [a small proportion] of Durex's net revenue.
123. Accordingly, the CMA finds that the Merger does not give rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects in relation to the supply of personal lubricants to independent pharmacies in the UK.

### ***Supply of personal lubricants to grocery retailers and national pharmacy chains***

#### *Shares of supply*

124. The Parties have submitted market share estimates based on Nielsen data (covering 'grocery multiples', 'chemists', and 'impulse' sales) and Euromonitor data (covering 'sex shops' and 'e-commerce' sales).
125. The Parties have not provided the CMA with estimates of their combined market share in the supply of personal lubricants to grocery retailers and national pharmacy chains. They estimate, however, the K-Y and Durex combined market share to be around [40-50]% by reference to the sales of both branded and private label personal lubricants by supermarkets, pharmacies, para-pharmacies, major online retailers such as Amazon and online specialist websites (together referred by the Parties as 'mass-market retailers').
126. The CMA notes that market share estimates for the combined sales of Durex and K-Y lubricants based on Nielsen data range between circa 89% in 'grocery multiples'<sup>24</sup> and circa 61% in 'chemists'.
127. The CMA estimates, based on actual sales data obtained from retailers, that K-Y and Durex account for around [80-90]% of the sales of personal lubricants by grocery retailers and national pharmacy chains (including private label products).<sup>25</sup> The retailers that responded to the CMA questions account for more than 80% of the total sales of personal lubricants by offline non-adult retailers, based on Nielsen estimates.

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<sup>23</sup> [X].

<sup>24</sup> In Nielsen data, 'grocery multiples' is a defined sub-set of the major supermarkets in the UK (but excludes Aldi and Lidl).

<sup>25</sup> The CMA estimates include online sales by grocery retailers and national pharmacy chains. These online sales have not been removed from the CMA estimates for reasons of practicality and due to relatively small importance (less than 10%).

128. The CMA estimates that other branded personal lubricants' share of supply is around [0-10%] (lower than Nielsen's estimate) and that the share of supply of private label products is around [10-20%] (higher than Nielsen's estimate).
129. The share of Durex and K-Y in the supply of branded personal lubricants by grocery retailers and national pharmacy chains (ie excluding private label products) is over 90%.
130. The Parties have a combined market share of more than 80% in most of the major grocery retailers and national pharmacy chains (Tesco, Sainsbury's, Asda, Waitrose, Co-operative Group, Morrisons, and Boots).
131. The Parties are the only suppliers to four major grocery retailers (Sainsbury's, Waitrose, Morrisons, and Co-operative Group) and for some retailers (Asda and Tesco) the only other supplier is the manufacturer of their private label personal lubricants.
132. An internal document indicates [REDACTED].<sup>26</sup> Another internal document of J&J estimates that [REDACTED].<sup>27</sup>

#### *Closeness of competition*

133. If the products of the merger firms are close substitutes, unilateral effects are more likely because the merged firm will recapture a significant share of the sales lost in response to the price increase, making the price rise less costly.<sup>28</sup>

#### *Parties' submission*

134. The Parties consider that their products do not compete closely. They submitted that there are other products on the market that are positioned to compete more directly with each of these brands in terms of reason for use, price, packaging or special features and composition.
135. In particular, they submitted that K-Y is positioned more closely with 'functional' or problem-solving personal lubricants whereas the Durex range of products compete more closely with products under the 'pleasure enhancement' banner. They rely on internal documents and internal research to support their submission, including an internal document indicating that when K-Y launched [REDACTED] (a pleasure enhancement lubricant) in Australia, there was no cannibalisation of its 'functional' range of lubricants.

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<sup>26</sup> [REDACTED].

<sup>27</sup> [REDACTED].

<sup>28</sup> [Merger Assessment Guidelines](#), paragraph 5.4.9 (a)

136. The Parties have conducted a number of price correlation analyses as well as an analysis of the impact of a price increase of the Durex Play Range. These are considered in more detail below in paragraphs 161 to 165.

*CMA's analysis*

137. To assess the extent to which the Parties compete closely with each other, the CMA has examined a range of evidence, including:

- (a) the Parties' internal documents;
- (b) third party responses;
- (c) third parties' sales data.

- *Internal documents*

138. RB's internal documents suggest that most of the Durex range of lubricants [REDACTED].<sup>29</sup> [REDACTED],<sup>30</sup> [REDACTED].<sup>31,32</sup>

139. The CMA considered a number of internal documents to provide some evidence of closeness of competition. It first deals with the documents the parties pointed to as showing that the parties were not close competitors.

140. The CMA considered the event analysis in Australia following the launch of [a pleasure enhancement lubricant in the K-Y range] in Australia. This internal analysis indicated that there was 0% cannibalisation of K-Y's 'functional' range of lubricants when K-Y launched [a pleasure enhancement lubricant in the K-Y range] in Australia. The parties consider that this shows that K-Y's 'functional' brand does not compete with pleasure enhancing brands or products. However, the CMA does not consider this provides clear evidence on the question of closeness of competition in the UK for the following reasons.

141. First, K-Y Jelly may be more differentiated from [a pleasure enhancement lubricant in the K-Y range] than from some products in the Durex range. Based on the price point of [a pleasure enhancement lubricant in the K-Y range], this is a premium product such as Durex Embrace.

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<sup>29</sup> [REDACTED].

<sup>30</sup> [REDACTED].

<sup>31</sup> [REDACTED].

<sup>32</sup> [REDACTED].

142. Second, the lack of cannibalisation may be the result of the successful marketing of J&J to differentiate the positioning of these two products of its portfolio and to increase the size of the lubricants market.
143. Finally, as stated by J&J in its submission of 3 December 2014, sexual attitudes and product usage are not the same in different parts of the world. Therefore, the CMA considers that this document is not necessarily indicative of lack of competition between Durex and K-Y in the UK.
144. The internal documents which the CMA considered provided evidence that the parties' see their respective brands as competing or closely competing were as follows. The CMA sets out the documents for each party separately below.

- *RB's internal documents*

145. There are several RB internal documents which demonstrate that RB monitors the K-Y brand and seeks to analyse the performance of its personal lubricant brands in the context of K-Y's performance. [REDACTED] Durex and K-Y are the personal lubricants brands with the highest levels of brand awareness in the UK<sup>33</sup> (see more details below in paragraph 185(b)).

146. Further, [REDACTED]<sup>34</sup> [REDACTED].<sup>35</sup>

147. [REDACTED].<sup>36</sup> [REDACTED].

148. [REDACTED].

- *J&J's internal documents*

149. The CMA considers that several of J&J's internal documents also monitor and compare the performance of the K-Y personal lubricants brand with the Durex range of personal lubricants. [REDACTED]<sup>37</sup> [REDACTED].<sup>38</sup>

150. [REDACTED].<sup>39</sup>

151. On balance, the CMA notes that these internal documents suggest that Durex and K-Y are close competitors because they show that:

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33 [REDACTED].  
34 [REDACTED].  
35 [REDACTED].  
36 [REDACTED].  
37 [REDACTED].  
38 [REDACTED].  
39 [REDACTED].

- (a) Consumers' awareness regarding K-Y and Durex is significantly higher than regarding any other brand of personal lubricants, with some customers switching between these two brands;
- (b) J&J and RB each monitor K-Y's and Durex's market positions on a regular basis in the UK and other jurisdictions; and
- (c) [REDACTED].

- *Third parties' submissions*

152. The majority of retailers consider that there is some form of differentiation in the personal lubricants category. However, each noted that:
- (a) K-Y and Durex lubricants are part of the same category and are merchandised in the same bay on shelves in store;
  - (b) both K-Y and Durex are well-known brands of personal lubricants;
  - (c) the K-Y and Durex brands compete strongly 'on function', ie although their marketing positioning may be different, the products are materially the same and have the same end-use.
153. Further, almost all retailers who responded to the CMA's investigation named at least one of the Durex personal lubricants as the product that competes most closely with K-Y Jelly.
154. A grocery retailer also noted that customers are loyal to the K-Y brand. 80% of the customers of this category never bought another product in the lubricant category and that when they bought other personal lubricant in its store (20% of this retailer's customers) the brand they bought was Durex. This statement suggests that customers are loyal to K-Y and reflects the fact that, for the customers of this grocery retailer, Durex is the only alternative to K-Y.
155. Submissions from third party retailers also suggest that, to some extent, the Parties are competing against each other in the negotiations with retailers for shelf space, advertising space or promotion slots.
156. One retailer stated that, although K-Y and Durex had not yet been explicitly played off against each other, they are currently able to exercise a degree of constraint over Durex through the implicit threat of further unilaterally investing in K-Y. It stated that, with the Merger, it will lose the only real tool it currently has for constraining Durex from increasing the wholesale price of personal lubricants.
157. [REDACTED].

158. More generally, some retailers believe that the Merger would have a negative impact on their ability to negotiate with RB. They submitted that the Merger would shift negotiating power in RB's favour, reducing these retailers' ability to achieve favourable cost prices, and promotional and marketing funding, because RB would account for an even greater proportion of the lubricants sold by each of them, and would be their only supplier of branded lubricant products.
159. The CMA considers that the submissions of third parties suggest that:
- (a) K-Y and Durex brands do compete;
  - (b) The loss of K-Y may reduce the negotiation powers of the retailers in relation to personal lubricants (see below at paragraph 254).
- *Third parties' sales data*
160. The [X] sales data submitted by the Parties shows that although 92% of K-Y customers are brand loyal, around 4% of K-Y customers have also bought a personal lubricant in the Durex range. The Parties have not indicated the period of reference of the [X]'s cross-shopping analysis.<sup>40</sup> This suggests that, to some extent, customers switch between Durex and K-Y.<sup>41</sup>
161. RB also submitted an analysis conducted by Nera Economic Consulting (**Nera**) of the impact of the Durex Play range price increase on the volume of Durex and K-Y sales in early 2013 (**Nera Analysis**). This analysis shows that K-Y sales slightly increased following the increase in price of the Durex Play range, while the volume of sales of all Durex ranges also increased.
162. The CMA considers that the Nera Analysis submitted by the Parties can, at best, only provide an indication of the closeness of competition between personal lubricants in different product segments, because the Nera Analysis does not isolate the impact of the price increase of the Durex Play range on the volume of sales of this particular range and does not account for unobserved factors that may drive correlation.

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<sup>40</sup> The Parties have not indicated the period of reference of [X]'s cross-shopping analysis.

<sup>41</sup> The CMA also notes that a grocery retailer has provided sales data to the CMA suggesting that following a price increase due to an increase in pack size of the Durex Play range in early 2013, the number of Durex customers declined and it further suggests that a certain proportion of customers may have switched to K-Y Jelly ([5-15]% increase in sales). However, as this analysis does not control for a number of other factors that might have accounted for the increase in K-Y sales (such as overall increased demand or seasonal variations), the CMA has not placed material weight on this.

- *Price correlation analysis*

163. The CMA notes, regarding the price correlation analysis mentioned above in paragraph 136, that even if K-Y and the Durex products included in the Parties' price correlation were close competitors, the analysis would not show any price correlation, because the most significant price variation in these products seems to be driven by promotions and third parties have told the CMA that competing products may not be promoted at the same time as one another.
164. Further, the Parties' correlation analysis does not show the extent and source of competitive constraints between K-Y and the Durex products mentioned above, because it is only a comparison between a pair of selected products and does not account for other factors that may have led to the identified correlation.
165. Therefore, the CMA considers that it cannot place material weight on the price correlation analysis submitted by the Parties.

- *Other factors*

166. The CMA also considered other factors in its assessment of the closeness of competition between Durex and K-Y.
167. First, only a small number of grocery retailers (three) that responded to the CMA's investigation have suppliers other than RB and J&J (including private label suppliers) for the supply of personal lubricants, which suggests that for the customers of the other grocery retailers Durex and K-Y are the only two personal lubricants they may choose and that RB and J&J are each other's closest competitors in the negotiations with these retailers for the supply of personal lubricants.
168. Second, Durex and K-Y are next to each other on the shelves of grocery retailers and smaller outlets of national pharmacy chains. However, RB submitted that where retailers devote sufficient shelf space to the sexual well-being category, retailers regularly position K-Y products on a different shelf from Durex products: '*K-Y products are often positioned with the female intimate healthcare products (including vaginal moisturisers etc.) whereas Durex lubricants are often positioned above the condom shelf*'.<sup>42</sup>

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<sup>42</sup> See RB's submission of 3 December 2014, p. 17.

169. The CMA considers that the shelf positioning of Durex and K-Y may not accurately reflect the extent to which these products compete, [REDACTED].<sup>43</sup>

- *Conclusion*

170. Although the Parties' personal lubricant products seem to have different marketing propositions, the CMA considers that the evidence available to it suggests that the Parties are the only two branded personal lubricants offered by most grocery retailers and the major branded personal lubricants offered in national pharmacy chains and there is evidence that they do compete with each other. As such, the evidence available shows that they are each other's closest competitors for the supply of personal lubricants to grocery retailers and national pharmacy chains.

*Constraint from other suppliers of personal lubricants*

171. The Parties submit that there are a large number of existing suppliers already active in the 'mass-market retail channel' particularly in pharmacy chains (Ann Summers, Lovehoney, Pjur, woohoo! and ID). Further, the Parties submit that brands currently only available in the online channel and in specialist adult retailers impose a significant competitive constraint as suppliers of these brands could rapidly expand their activities in response to an opportunity in grocery retailers and national pharmacy chains.

*Constraints from private label products*

172. The Parties submitted that private label products are a relevant competitive constraint on the Parties. They stated that private label products are widely distributed and often account for a significant proportion of a retailer's personal lubricant sales.

173. RB gave as an example of the constraint imposed by private label [REDACTED].

174. Further, RB submitted that those retailers that do not have private label products can still benefit from the constraint imposed by those retailers that do through retailers' price matching policies, and that RB's experience is that those retailers that do not have private label products constantly keep under review the option to introduce one.

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<sup>43</sup> [REDACTED].

175. RB also noted that [X]'s sales data shows that the number of Durex customers that also bought [X]'s private label offering is twice the number of customers that also bought K-Y.
176. The CMA has reviewed the [X] sales data and notes that the number of customers who purchased both Durex Play Feel and [X]'s private label products is significantly higher than the number of customers who purchased both Durex Play Feel and K-Y.
177. However, the number of customer that purchased both the Durex base range<sup>44</sup> and [X]'s private label products is only slightly higher than the number of customers that bought the Durex base range and K-Y.
178. This suggests that private label products do not constrain all the Durex range of personal lubricants in the same way.
179. Further, as mentioned above in paragraph 64, the data submitted by a grocery retailer suggests that there is an asymmetric constraint from Durex or K-Y to the private label product rather than vice-versa.
180. The CMA also notes that the Parties have not provided the CMA with evidence of other retailers considering to launch a private label for personal lubricants. RB's statement is contrary to the submissions received from grocery retailers. [X].
181. Finally, based on the evidence examined in paragraphs 53 to 66, the CMA considers that the constraint of the private label products on the Parties is not homogenous across all retailers as some retailers do not offer private label products and the strength of private label products differs between retailers. Furthermore, the overall market share of private label personal lubricants in the UK is low.
182. The CMA, therefore, considers that suppliers of private label lubricants will not impose a sufficient constraint to the Parties after the Merger.

#### *Constraints from branded personal lubricants*

183. Regarding the constraint imposed on the Parties by suppliers of branded personal lubricants, as mentioned above in paragraphs 126 to 129, the Merger will lead to a high concentration in the supply of personal lubricants to grocery retailers and national pharmacy chains. The sales of Durex personal lubricants and K-Y account for [80-90]% of the total sales of personal

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<sup>44</sup> [X].

lubricants of these retailers and the sales of other branded personal lubricants represent less than 10% of their total sales.

184. Further, the CMA considered the following evidence:

- (a) Based on the submissions of third party retailers, the Parties only compete with other suppliers of branded personal lubricants in national pharmacy chains and even then only in a subset of their stores. Durex and K-Y are the only branded products available in [50-60]% of [redacted] stores and [30-40]% of [redacted] pharmacies. This means that the Parties would be subject to limited constraints from those brands in most of the retailers within the relevant frame of reference.
- (b) Some branded products mentioned by the Parties as competing with K-Y and Durex in grocery retailers such as Tesco, Morrisons, and Asda (Sylk, Replens, Balance Activ) are not personal lubricants, but vaginal moisturisers.
- (c) [redacted].<sup>45</sup> This suggests that the share of shelf space attributed to Durex may be higher in some outlets than the number of stocked brands in some retailers may suggest.
- (d) Durex is present with a wide range of personal lubricants products and K-Y Jelly may be present in two sizes, whereas some competitors are only present with one or two products. In addition, some branded products that 'compete' with K-Y and Durex appear to fill specific niches (eg organic products like woohoo!) rather than compete directly with the Parties' personal lubricants.

185. Finally, the CMA currently considers that branded lubricants available in specialist adult retailers and in online retailers do not pose a significant constraint on Durex and K-Y in grocery retailers and national pharmacy chains, for the following reasons:

- (a) Most evidence, including submissions of third party retailers, suggest that Durex and K-Y benefit from high brand awareness ([redacted]),<sup>46</sup> and customers are loyal to the K-Y brand (see paragraph 154);

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<sup>45</sup> [redacted].  
<sup>46</sup> [redacted].

- (b) The UK consumers' awareness of all the other brands of personal lubricants in the UK is [10-20]%,<sup>47</sup> which suggests that consumers are more resistant to switching to other brands; and
  - (c) Some third parties suggested that personal lubricants are bought as a secondary purchase to other products in the basket of grocery retailers' or national pharmacy chains' customers, whereas in specialist adult retailers and in the online channel, customers tend to make planned purchases (see paragraph 75).
186. The CMA, therefore, considers that other suppliers of branded personal lubricants will not sufficiently constrain RB post-Merger.
187. The CMA considers the ability of other brands to constrain the Parties through entry into this channel below in the barriers to entry and expansion section.

### ***Conclusion on closeness of competition***

188. For the reasons set out above, the CMA considers that, although Durex personal lubricants and K-Y Jelly are differentiated to a certain extent and have a different marketing positioning, the Parties are close competitors in the supply of personal lubricants to grocery retailers and national pharmacy chains, primarily because:
- (a) Evidence considered by the CMA shows, to some extent, switching between K-Y and some personal lubricants of the Durex range (see the results of the [X] mentioned in paragraph 150 and [X]'s sales data).
  - (b) Other brands of personal lubricants are not generally available in grocery retailers in the UK and only have a limited presence in some national pharmacy chains' stores, leading to Durex and K-Y Jelly being each other's closest competing products, even if there might be a degree of differentiation between these products.
189. Additionally, some retailers expressed concerns about the negative impact of the Merger on their ability to negotiate with RB.
190. Therefore, in the absence of countervailing evidence, the CMA considers that the Parties are sufficiently close competitors and that, as a result of the Merger, RB will have an incentive to increase prices, as it will recapture a significant proportion of sales, or worsen other elements of its offer such as promotions given the loss of competitive interaction.

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<sup>47</sup> [X].

191. The CMA considers below whether entry or expansion or buyer power is sufficient to constrain the merged entity post-Merger.

### ***Loss of potential competition***

192. Unilateral effects may also arise from the elimination of potential competition. The removal of both an actual or perceived potential entrant can lessen competition by weakening the competitive constraint on an incumbent supplier. ‘Actual potential competition’ refers to a potential entrant that could have increased competition if and when entry occurs. ‘Perceived competition’ refers to a firm which imposes an existing constraint because of the threat that it would enter if existing firms in the market raised their prices, even though it is not credible that entry would actually occur.<sup>48</sup> The CMA assessed the loss of actual potential competition and perceived potential competition.

### ***Actual potential competition***

193. The K-Y brand is present in the pleasure enhancement segment in several countries including the USA, Australia, and New Zealand.
194. The CMA considers that, with the possible expansion of K-Y into a different brand positioning based around ‘sexual intimacy’ positioning in the UK, K-Y may have become an even closer competitor to Durex. K-Y would compete even closer with Durex across all its product range.
195. Therefore, the CMA assessed whether, with the Merger, RB is eliminating the actual possibility of J&J expanding its K-Y range in the UK and becoming a closer competitor to RB (actual potential competition) or the threat that K-Y would expand if existing firms in the market raised their prices, even if it is not realistic to consider that expansion would actually occur (perceived potential competition).<sup>49</sup>

### ***Parties’ submission***

196. [Reference to business considerations of J&J regarding the expansion of its range in the UK].<sup>50</sup>
197. [Reference to business considerations of J&J regarding the expansion of its range in the UK].<sup>51</sup>

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<sup>48</sup> See [Merger Assessment Guidelines](#) paragraphs 5.4.13, 5.4.14, and 5.4.16.

<sup>49</sup> See [Merger Assessment Guidelines](#) paragraphs 5.4.14 and 5.4.16.

<sup>50</sup> [REDACTED].

<sup>51</sup> [REDACTED].

198. [Reference to business considerations of J&J regarding the expansion of its range in the UK].<sup>52</sup>
199. [Reference to business considerations of J&J regarding the expansion of its range in the UK].<sup>53</sup>
200. J&J submitted that these documents merely reflect preliminary proposals, not plans adopted, approved or attempted to implement.
201. Further, J&J submitted evidence to support that all plans for expansion of K-Y in the UK or elsewhere had been abandoned by the J&J's Global Operations Committee.
202. [Reference to business considerations of J&J regarding the expansion of its range in the UK]:
- (a) [REDACTED].
  - (b) [REDACTED].
  - (c) [REDACTED].<sup>54</sup>
  - (d) [REDACTED].
  - (e) [REDACTED].
  - (f) [REDACTED].<sup>55</sup>

*CMA's analysis*

203. The CMA considered the extent to which J&J was likely to expand the K-Y brand absent the Merger and whether the Merger might be expected to give rise to a substantial lessening of competition as a result. Further, the CMA also considered the extent to which the perceived potential entry of additional K-Y products into the UK was constraining RB pre-Merger.
204. The evidence before the CMA suggests that J&J decided to divest the K-Y brand [REDACTED].
205. However, [REDACTED].

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<sup>52</sup> [REDACTED]

<sup>53</sup> [REDACTED].

<sup>54</sup> [REDACTED].

<sup>55</sup> See J&J's submission of 3 December 2014.

206. Therefore, the CMA considers that the evidence mentioned above tends to indicate that J&J had not entirely closed off the possibility of expanding the product range. [REDACTED]. As such, the CMA cannot conclusively decide that there was no prospect of a brand and range extension for the K-Y brand in the UK – similar to that effected in other jurisdictions. However, the CMA does not consider that it is necessary to conclude on this point.

*Perceived potential competition*

207. The CMA also considered evidence demonstrating that the K-Y brand has a strong equity and it is easily expandable to new areas.

208. First, in internal documents prepared for the purposes of the Merger, J&J [REDACTED].<sup>56</sup>

209. Second, a J&J internal document [REDACTED]:

(a) [REDACTED];

(b) [REDACTED];

(c) [REDACTED].<sup>57</sup>

210. [REDACTED].

211. [REDACTED].

212. Based on the evidence before it, the CMA considers that, even if J&J had abandoned the plans it previously had in relation to the lubricants category in the UK, it may have decided to revisit and implement that strategy again absent the Merger. The evidence available to the CMA indicates that it would be relatively easy for J&J to expand the current positioning of the brand beyond the ‘functional’ or ‘comfort’ area into an ‘intimacy’ positioning for the reasons mentioned above, in particular given the importance and relevant associations of the K-Y brand.

213. [REDACTED].<sup>58</sup>

214. The CMA therefore considers that the perceived potential expansion of the K-Y range may have been constraining the behaviour of RB on some of its brands, namely other than its basic range (‘Play Feel’ and ‘Durex Aloe Vera’).

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<sup>56</sup> [REDACTED].

<sup>57</sup> [REDACTED].

<sup>58</sup> [REDACTED].

215. As mentioned below in paragraph 226, the Parties have not submitted evidence of more obvious threats of other potential entrants. Although Ansell has recently established its condom unit's headquarters from Australia to Belgium, the Parties have not demonstrated that they are realistically considering the threat of Ansell starting to supply personal lubricants in the UK. Even if Ansell already supplies condoms in the UK, it is conceivable that the investment required for Ansell to enter in the lubricants category are higher than the investment required to expand the K-Y range of personal lubricants into the pleasure enhancement segment.
216. For the reasons set out above, the CMA cannot exclude the possibility that perceived potential competition from K-Y in the supply of personal lubricants to grocery retailers and independent pharmacy retail chains may have resulted in prices of Durex products being lower than they would otherwise have been.<sup>59</sup> With the Merger, RB may be eliminating the possibility of K-Y becoming an even closer competitor to its products in the UK and, therefore, may have an increased incentive to raise prices. However, the CMA considers that the evidence available regarding the elimination of potential perceived competition of K-Y is inconclusive.

*Conclusion on potential competition*

217. Given the CMA's findings in respect of horizontal unilateral effects arising *prima facie* as a result of loss of actual competition, it was not necessary for the CMA to determine conclusively the extent to which the Merger may also give rise to concerns arising from a loss of potential competition.

*Conclusion on horizontal unilateral effects*

218. As set out above, the CMA considers that Durex and K-Y are close competitors. Private label products and other branded personal lubricants do not appear to impose a sufficient constraint to the Parties after the Merger.
219. Accordingly, the CMA finds that the Merger raises significant competition concerns as a result of horizontal unilateral effects in relation to the supply of personal lubricants to grocery retailers and national pharmacy chains.
220. As such, the CMA considers that there is a realistic prospect of the Merger giving rise to a substantial lessening of competition regarding the supply of personal lubricants to grocery retailers and national pharmacy chains in the UK absent any countervailing factors.

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<sup>59</sup> See [Merger Assessment Guidelines](#) paragraph 5.4.18.

### ***Barriers to entry and expansion***

221. Entry or expansion of existing firms can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no substantial lessening of competition. In assessing whether entry or expansion might prevent a substantial lessening of competition, the CMA considers whether such entry or expansion would be timely, likely and sufficient.<sup>60</sup>

#### *Parties' submission*

222. The Parties submitted that there are few barriers to entry for new suppliers. They also stated that from a production perspective, there are no intellectual property rights, significant know-how or extensive certification requirements, and manufacture is also simple and involves limited sunk costs and can be easily conducted by third parties on a toll basis or otherwise.

223. The Parties also submitted that it is not necessary to gain listings with the traditional 'bricks and mortar' retailers to enter or expand as a significant proportion of personal lubricant sales are conducted online.

#### *CMA's analysis*

224. As explained above in paragraphs 72 to 83, the online and specialist adult channels are considered separately for the purposes of the CMA's competitive analysis and the CMA considers that the threat of suppliers of personal lubricants to these channels expanding into the supply of personal lubricants to grocery retailers and national pharmacy chains does not significantly constrain the Parties.

225. Although the Parties submitted that personal lubricants suppliers can use their online presence and/or their listing by some national pharmacy chains as a gateway to be listed in grocery retailers, they have not provided examples of any personal lubricants supplier that has been able use these channels as platforms to commence supplying grocery retailers. RB has only provided the CMA with examples of similar expansion occurring in healthcare categories other than personal lubricants.

226. Well-known brands of personal lubricants in other countries such as Mates, owned by Ansell, have not recently expanded into this product category in this channel in the UK. The Parties have not provided evidence showing that these

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<sup>60</sup> [Merger Assessment Guidelines](#), from paragraph 5.8.1.

brands should be considered as potential new entrants. The CMA notes that a grocery retailer mentioned that it delisted the Mates brand in 2013.

227. Third party retailers also stated that the product category is of low importance for their overall business, which may lead to a degree of inertia on the retailer side to encourage new entry. They also submitted that, due to the limited shelf space available in their outlets, they tend to list the brands and products that customers search for ie those with a high loyalty rate. They consider that each of these brands remain the most important to list and the Merger was not expected to change this.
228. The CMA has received feedback from other suppliers of personal lubricants that suggests that it is difficult to be listed by grocery retailers and there are few, if any, examples of other suppliers listing in grocery multiples. These listing difficulties emanate from margin requirements and other payments associated with funding for marketing and promotion. These were said to be prohibitive for other suppliers, particularly for single-brand suppliers.
229. Competitors also submitted that established suppliers such as RB and J&J can structure prices, other contributions, and terms and conditions with grocery retailers and national pharmacy chains across the range of their brands that leads to decreased incentives to switch away from RB and J&J as a supplier of personal lubricants or to allow new entrants into the personal lubricants category.
230. Information provided by third parties also indicates that attempts by competing lubricants brands to get their products on the shelves of mass-market retailers have not been successful.
231. [REDACTED].<sup>61</sup>
232. The CMA also notes there may be economies of scope for suppliers that, like the Parties, have a wide portfolio of products or brands in negotiating across that portfolio. This creates high barriers to single-product or single-brand entry and may decrease the ability and incentives of rivals to provide the same advantages to grocery retailers and national pharmacy chains that would allow them to compete effectively with the Parties after the Merger.
233. Furthermore, the supply of personal lubricants to grocery retailers and national pharmacy chains may be characterised by high levels of sunk cost. [REDACTED].<sup>62</sup>  
[REDACTED].

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<sup>61</sup> [REDACTED].

<sup>62</sup> [REDACTED].

234. Finally, although the Parties estimate that the personal lubricants category is growing 10% per year, this growth appears to be driven by online sales to a considerable extent, and it is unclear to what extent the growth of the personal lubricants category may induce entry in grocery retailers and national pharmacy chains.

#### *Conclusion on barriers to entry and expansion*

235. For the reasons set out above, in particular because new entrants would need to invest significantly in advertisement, contribution to retailers and incur other costs in order to become an effective competitor in the supply of personal lubricants to grocery retailers and national pharmacy chains, the CMA considers that entry or expansion would not be timely, likely or sufficient to prevent a realistic prospect of a substantial lessening of competition arising from the Merger.

#### ***Countervailing buyer power***

236. In some circumstances, an individual customer may be able to use its negotiating strength to limit the ability of a merged firm to raise prices. The CMA refers to this as countervailing buyer power.<sup>63</sup>

#### *Parties' submission*

237. The Parties submitted that grocery retailers and national pharmacy chains have significant buyer power in negotiations with suppliers. These retailers are without exception large, well-resourced organisations with sophisticated and well-developed strategies.

238. Further, the Parties consider themselves under constant pressure, in particular from grocery retailers and national pharmacy chains, to justify listings and ensure products remain relevant and attractive.

239. RB submitted that grocery retailers and national pharmacy chains can even threaten to punish RB in relation to other products in their portfolio.

240. RB has experienced instances of retailers delisting stock keeping units (**SKU**) for various reasons, which they can do at minimal notice without compensation. In particular, RB has provided the following examples of retailers using its buyer power:

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<sup>63</sup> [Merger Assessment Guidelines](#), paragraph 5.9.1.

(a) [REDACTED]; and

(b) [REDACTED].

*CMA's view*

241. Third party retailers stated that they seek to provide the brands and products that customers demand. Removing products to which customers are loyal (see above in paragraphs 154 and 185(a)) would be against that strategy.
242. The large majority of retailers consider both Durex and K-Y to be 'must have' brands being essential for them to stock, limiting their ability to negotiate with the suppliers. Some grocery retailers highlighted customers' loyalty to the K-Y brand and some grocery retailers stated that they would not delist the K-Y line.
243. The example submitted by RB of [REDACTED] should be interpreted in the context of the wide range of Durex personal lubricants in terms of flavours and sizes. RB did not specify [REDACTED]. The CMA, therefore, does not consider it to be sufficient evidence that Durex personal lubricants are not 'must have' products and that Durex is not a 'must have brand'.
244. Third parties informed the CMA that, [REDACTED], RB was able to implement a price increase of Durex lubricants in 2013 (through a change in package size)<sup>64</sup> [REDACTED].<sup>65</sup> This evidence suggests that RB has significant bargaining power. [REDACTED].
245. Furthermore, as mentioned above in paragraphs 156 and 158, some third parties submitted that the Merger would reduce their negotiating strength.
246. In this regard, some third party retailers submitted that they negotiate their Joint Business Plans with RB at brand level or for the healthcare category and the negotiations regarding the lubricants category are not made separately from other Durex's healthcare products. As RB supplies a broad range of product categories to grocery retailers and national pharmacy chains, including condoms, this enhances RB's negotiating power because it may leverage its bargaining position in other products within its portfolio to personal lubricants.
247. Third parties also stated that the personal lubricants category is a relatively small category to grocery retailers and that customers of personal lubricants are not highly price sensitive.

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<sup>64</sup> [REDACTED].

<sup>65</sup> [REDACTED].

248. Some third parties therefore submitted that grocery retailers do not have strong incentives to exercise their buyer power *vis-à-vis* the Parties, should it exist, which is corroborated by the submission of most third party retailers that in the personal lubricants category they have never used the normal ‘levers’ that they could have used in negotiations with RB and/or J&J.
249. The Parties have not produced evidence of retailers referring to their private label lubricants offering during their negotiations<sup>66</sup> with the Parties. Furthermore, [REDACTED].
250. For the reasons described above, the CMA considers that the threat of grocery retailers to list alternative brands or introduce private label products is not credible.
251. The CMA considers that it would be more profitable for grocery retailers to pass through a wholesale price rise than take an alternative action, such as sponsor a competing brand or introducing a private label product.
252. Based on the evidence available, the CMA considers that the buyer power of grocery retailers and national pharmacy chains does not appear sufficient to offset any anticompetitive effects arising from the Merger.

### **Third party views**

253. The CMA contacted customers (retailers and wholesalers) and competitors of the Parties. The comments of third parties are expressed above. In general, some competitors and customers raised concerns regarding the Merger.
254. Competitors expressed concerns with the Merger, in particular noting that combining the two leading brands of personal lubricants under the RB’s ownership will limit competition for shelf space in grocery retailers and national pharmacy chains and it will increase barriers to entry into this channel, as it will be even harder to obtain a listing. They submitted that RB is already ‘dominant’ in the ‘sexual well-being’ category in the grocery retail and national pharmacy chains channel and that, with the Merger, RB’s products will make up the entire lubricants shelf space in many retailers in this channel for the personal lubricants category. They, therefore, argue that the Merger would eliminate competition for shelf space within the category.
255. [REDACTED] wholesalers that responded to the CMA raised concerns about the Merger, although the Merger would not affect its business. It submitted that small or independent pharmacies would commonly stock only Durex, K-Y, and

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<sup>66</sup> [REDACTED].

a number of 'moisturisers'. After the Merger, only one supplier of personal lubricants not aimed at moisturising would then remain.

256. Third party comments have been taken into account where appropriate in the competitive assessment above.

## Conclusion on substantial lessening of competition

257. Based on the evidence set out above, the CMA believes that it is or may be the case that the Merger may be expected to result in a substantial lessening of competition as a result of horizontal unilateral effects in relation to the supply of personal lubricants to grocery retailers and national pharmacy chains.

## Exceptions to the duty to refer

258. Where the CMA's duty to refer is engaged, the CMA may, pursuant to section 33(2)(a) of the Act, decide not to refer the merger under investigation for a phase 2 investigation on the basis that the market(s) concerned is/are not of sufficient importance to justify the making of a reference (the ***de minimis* exception**). The CMA has considered below whether it is appropriate to apply the *de minimis* exception to the present case.

### ***Markets of insufficient importance***

259. In considering whether to apply the *de minimis* exception, the CMA will consider, in broad terms, whether the costs involved in a reference would be disproportionate to the size of the market(s) concerned, taking into account also the likelihood that harm will arise, the magnitude of competition potentially lost and the duration of such effects.<sup>67</sup>

### *'In principle' availability of undertakings in lieu*

260. The CMA's general policy, regardless of the size of the affected market, is not to apply the *de minimis* exception where clear-cut undertakings in lieu of a reference could, in principle, be offered by the Parties to resolve the concerns identified.<sup>68</sup>

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<sup>67</sup> [Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance](#) (OFT1122) (Exceptions Guidance), December 2010, chapter 2. The [Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance](#) were adopted by the CMA (see [Mergers: Guidance on the CMA's jurisdiction and procedure](#), Annex D).

<sup>68</sup> [Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance](#) (OFT1122), paragraphs 2.2 and 2.18-27.

261. The CMA's judgment as to whether undertakings in lieu are available 'in principle' for the purposes of considering whether the '*de minimis*' exception can be applied, does not depend on an actual offer of undertakings in lieu being made by the Parties, and in any event, the existence of any such offer is unknown to the decision maker at the time of his or her decision as to whether undertakings are in principle available.
262. The CMA does not consider that divestment of the K-Y brand in the UK would be tantamount to prohibiting the Merger altogether<sup>69</sup>. [X]<sup>70</sup>. [X].
263. In most cases, a clear-cut undertaking in lieu will involve a structural divestment. The CMA considered whether the Parties could, in principle, divest the part of the Merger that raises concerns to an independent third party purchaser.<sup>71</sup> In particular, the CMA considered whether the K-Y brand could, for instance, be licenced to a third party supplier in the UK in the context of its 'in principle' assessment outlined above.
264. On the basis of the information available to the CMA at this stage, it has some doubts as to the extent to which a licence for the K-Y brand in the UK would be clearly and effectively separable from the remainder of the K-Y brand, and whether it would be a viable and attractive package to a potential third party purchaser.
265. Such concerns might ultimately be surmountable, but the CMA has made it clear it will take a conservative approach in assessing whether undertakings in lieu are in principle available in the context of the *de minimis* assessment.<sup>72</sup> To the extent that there is any doubt as to whether undertakings in lieu would meet the 'clear-cut' standard, as is the case here, they will not be included in the 'in principle' assessment.<sup>73</sup>
266. Accordingly, the CMA does not consider that a clear-cut undertaking in lieu is 'in principle' available in this case.

### *Relevant factors*

267. When determining whether it should apply its '*de minimis*' discretion, the CMA assesses the expected consumer harm from the Merger, in particular whether

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<sup>69</sup> Exceptions Guidance, paragraph 2.25.

<sup>70</sup> Exceptions Guidance, paragraph 2.20.

<sup>71</sup> Exceptions Guidance, paragraph 2.24.

<sup>72</sup> Towers Watson/EMB Group (OFT 2010), Ordnance Survey/LGID (OFT 2010), Atlas Copco/ Medical gas division of Penlon (OFT 2011).

<sup>73</sup> Exceptions Guidance, paragraph 2.27.

the benefits of the reference (prevention of the harm that would result from the Merger) are expected materially to outweigh the public costs of a reference.

268. The CMA will consider the likely level of consumer harm by reference to a number of factors. The main factors that the CMA considers in determining the expected customer harm are the following:<sup>74</sup>
- (a) The size of the market;
  - (b) The strength of the CMA's concern (that is, its view on the likelihood that The substantial lessening of competition will occur);
  - (c) The magnitude of competition lost by the merger;
  - (d) The durability of the merger's impact; and
  - (e) Any wider implications, including the merger's potential replicability and rationale.
269. The CMA has considered each of the above factors in determining whether to exercise its discretion to apply the '*de minimis*' exception in this case.

#### *Market size*

270. The market concerned is the market for the supply of personal lubricants to grocery retailers and national pharmacy chains. The size of this market, based on the CMA's estimates using data provided by the Parties and retailers in the relevant frame of reference, was around £[5-10] million in 2013. Hence, the annual value of the market is less than the £10 million threshold above which a reference would generally be justified.<sup>75</sup>

#### *Strength of the CMA's concerns*

271. The CMA's belief is that there is a realistic prospect that the Merger may result in a substantial lessening of competition. The Parties are the two suppliers of major branded personal lubricants in the UK – in several grocery multiples and national pharmacy outlets, they are the only personal lubricants offered to consumers. As such, even though the CMA has received relatively limited evidence relating to consumer switching between certain products of the Durex range and K-Y, it is clear that they are each other's closest competitors. In addition, other brands of personal lubricants are generally not available at grocery retailers in the UK and only have a limited presence in some national

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<sup>74</sup> Exceptions Guidance, section 2.

<sup>75</sup> Exceptions Guidance, paragraph 2.15.

pharmacy chains' stores and any constraint from private label products is not uniform across grocery retailers.

272. The Merger may also shift bargaining power in RB's favour in its negotiations with grocery retailers and national pharmacy chains given that RB would account for an even greater proportion of the lubricants sold by these retailers and would be the only supplier of branded lubricant products to grocery retailers, which is a concern some retailers expressed.
273. Furthermore, although the CMA does not conclude on the point, RB may be eliminating the potential threat of K-Y expanding its range of personal lubricants in the UK, becoming an even closer competitor to RB.
274. Neither the prospect of new entry or expansion and buyer power are sufficient to prevent competitive harm from arising.
275. Therefore, the CMA believes that it is more than fanciful but less than certain that the merger will result in a substantial lessening of competition.

#### *Magnitude of competition lost*

276. The Merger involves the combination of the two main suppliers of personal lubricant brands in the UK. The Merger may, therefore, increase RB's incentives to increase price or worsen other elements of its offer.

#### *Durability*

277. The evidence available to the CMA indicates that barriers to entry are high in this market, as set out above. Therefore, any harm arising from the merger is unlikely to be compensated in the short term.

#### *Replicability and rationale*

278. The potentially 'replicable' quality of particular mergers means that the exercise of the CMA's *de minimis* discretion in one case could cumulatively lead to aggregate customer harm, because consistency of treatment may require that this discretion is also applied in future cases in the same sector.<sup>76</sup> This case involves the merger of two leading brands to grocery multiple retailers and national pharmacy chains, a situation which can arise regularly and therefore should be treated cautiously in terms in the consideration of the '*de minimis*' discretion.

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<sup>76</sup> Exceptions Guidance, paragraph 2.42.

279. The CMA may also have regard to the economic rationale behind a merger. In this case, as noted at paragraph 17 above, [X].

*Conclusion on the application of the de minimis exception*

280. Taking all the above factors into consideration, the CMA considers that, on balance, it is not appropriate to exercise its 'de minimis' discretion in this case.

**Decision**

281. Consequently, the CMA believes that it is or may be the case that the Merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

282. The CMA considers that it is under a duty to refer under section 33(1) of the Act. However, the duty to refer is not exercised pursuant to section 33(3)(b) whilst the CMA is considering whether to accept undertakings under section 73 of the Act in lieu of a reference. Pursuant to section 73A(1) of the Act, the Parties have until 30 December 2014 to offer an undertaking to the CMA that might be accepted by the CMA under section 73(2) of the Act. If the Parties do not offer an undertaking by this date, if the Parties indicate before this date that they do not wish to offer an undertaking, or if pursuant to section 73A(2) of the Act the CMA decides by 7 January 2015 that there are no reasonable grounds for believing that it might accept the undertaking offered by the Parties, or a modified version of it, then the CMA will refer this Merger pursuant to sections 33(1) and 34ZA(2) of the Act.

**Sheldon Mills**  
**Senior Director, Mergers Group**  
**Competition and Markets Authority**  
**19 December 2014**