

Anticipated acquisition by Glaxosmithkline plc of Maxinutrition Group Holdings Limited

**ME/4809/10**

The OFT's decision on reference under section 33(1) given on 14 February 2011. Full text of decision published 21 February 2011.

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**Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.**

## **PARTIES**

1. **GlaxoSmithKline plc** (GSK) is a global healthcare group engaged in the development, manufacture and marketing of pharmaceutical and consumer healthcare products. Its shares are listed on the London Stock Exchange and the New York Stock exchange. GSK has its corporate head office in London with operations in 120 countries and products sold in over 150 countries. GSK's global turnover in 2009 was £28,368 million, of which £[ ] was accounted for by the Lucozade brand.
2. **Maxinutrition Group Holdings Limited** (Maxinutrition) supplies and distributes sports nutrition products. Its main brand is Maximuscle. Darwin Private Equity I LP and Darwin Private Equity Friends and Family Fund L.P. (together, Darwin) acquired Maxinutrition in 2007. In its last financial year, Maxinutrition's UK turnover was £34.9 million.

## **TRANSACTION**

3. On 10 December 2010, GSK and Darwin signed a conditional Share Sale Agreement under which GSK agreed to acquire the entire issued share capital of Maxinutrition, for a consideration of approximately £162 million.
4. The proposed transaction is being notified in the UK, Austria, Italy and Greece.

## **JURISDICTION**

5. As a result of this transaction, the enterprises GSK and Maxinutrition will cease to be distinct.
6. Since Maxinutrition's turnover for the financial year ending 31 December 2009 was below £70 million, the turnover test in section 23(1)(b) of the Enterprise Act 2002 (the Act) is not met. However, the parties together accounted for more than 25 per cent share of supply of sports and energy drinks in the UK which will be increased as a result of the merger. The share of supply test under section 23(2)(b) of the Act is therefore met.

## **7. MARKET DEFINITION**

### **Product market**

8. The parties submitted that the relevant product markets are:
  - i. the supply of soft drinks, within which the sports and energy drinks segment is most relevant, and
  - ii. the supply of sports nutrition products.
9. The OFT also considered whether 'intermediate' products such as carbohydrate-based gels, drinks powders, ready to drink (RTD) protein drinks and sports bars, form a separate market.
10. The parties stated that sports and energy drinks are differentiated from typical soft drinks since sports and energy drinks are specifically used to replenish lost energy, and increase physical/mental endurance and performance. On the other hand, they submitted that sports nutrition products are aimed at enabling users to increase muscle size and strength or recovery, and are mainly supplied in a powder format which is then mixed with liquid. In addition, the parties noted that, whereas sports and energy drinks have a key ingredient of carbohydrates, the key ingredient in sports nutrition products is protein.
11. Third parties agreed that sports and energy drinks (on the one hand) and sports nutrition products (on the other) are differentiated, such that they would not be considered demand-side substitutes. With respect to certain intermediate products, some third parties were of the view that such

products are not substitutable with sports and energy drinks or sports nutrition products.

12. In any event, the OFT does not believe it is necessary to define the precise product scope in this case since no material competition concerns arise howsoever defined.

### **Geographic market**

13. The parties submitted that the relevant geographic market is national for both sports and energy drinks and sports nutrition products, given that such products are sold and distributed throughout the UK. All third parties agreed that this would be an appropriate basis. The OFT therefore assesses the proposed transaction on a UK level.

### **HORIZONTAL UNILATERAL EFFECTS**

14. With respect to the supply of sports and energy drinks, GSK is the market leader in the UK through its Lucozade brands which include: Lucozade Sport; Lucozade Energy; and Lucozade Alert. In 2010, it had [35-45] per cent share of supply in the UK.<sup>1</sup> Maxinutrition is active in the sports and energy drinks segment via its Viperactive brand. However, the parties estimated that Maxinutrition accounted for [less than one] per cent of the UK market in 2010.
15. In relation to the supply of sports nutrition products in the UK, Maxinutrition is the market leader, primarily through its Maximuscle brand. The parties estimated that Maxinutrition's share of supply in the UK was [15-25] per cent in 2010. GSK's sports nutrition brand is called Lucozade ProMuscle. The parties estimated that GSK would account for a share of supply of only [less than one] per cent in the UK.<sup>2</sup>
16. For the supply of intermediate products, the parties provided estimated share of supply data for energy and nutrition bars, that being one of the sub-segments of intermediate products where the parties' activities mainly overlap. The OFT does not have data for the other types of intermediate products. However, it has no reason to believe that the overlap would be

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<sup>1</sup> Based on Nielsen data for the 52 week period ending 30 October 2010.

<sup>2</sup> GSK told the OFT that it is exiting the sports nutrition market. However, the OFT has not had to consider this given that, even on the basis of the pre-merger counterfactual, competition concerns do not arise.

more significant and the combined share greater, for intermediate products more generally. The parties estimated that Maxinutrition's share of supply for energy and nutrition bars in the UK was [30-40] per cent in 2010. For GSK, its share was only [zero-five] per cent.

17. Third parties confirmed the parties' estimates of very small increments in the shares of supply of each of sports and energy drinks and sports nutrition products.
18. On the basis that: (1) there are only nominal increments caused by the merger in the supply of sports and energy drinks, the supply of sports nutrition products, and the supply of energy and nutrition bars in the UK; (2) the parties cannot, and are not considered to be close competitors; and (3) no third parties raised any material concerns, the OFT does not consider that the proposed transaction gives rise to a realistic prospect of a substantial lessening of competition on the basis of horizontal unilateral effects.

## **NON-HORIZONTAL EFFECTS – CONGLOMERATE EFFECTS**

19. The OFT also considered conglomerate effects. As stated in the OFT's Merger Assessment Guidelines,<sup>3</sup> mergers between firms producing complementary products may give rise to anticompetitive effects if they enhance the merged firm's scope for tying or bundling. In such a case, customers would have an incentive to buy the second product from the merged firm (where they may not do so if purchasing both products separately), such that rivals in the second product market would be at a disadvantage. The OFT looks at the ability, incentive and the effect of such a strategy.<sup>4</sup>
20. The parties submitted that the merged firm would have no ability to engage in tying/bundling since the distribution channels and customer base for sports and energy drinks and sports nutrition products are inherently different. The parties estimated that only eight per cent of sports nutrition products are distributed through grocery retailers (excluding health food shops), whereas the equivalent figure is over 99 per cent for sports and energy drinks. For sports nutrition products, health food shops and health and beauty retailers account for 55 per cent of sales, and internet retailing

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<sup>3</sup> OFT 1254.

<sup>4</sup> Merger Assessment Guidelines, paragraph 5.6.13, third bullet.

accounts for 16 per cent.<sup>5</sup> The parties also stated that [80-90] per cent of Lucozade sports and energy drinks sales are to grocery multiples, cash and carry, convenience wholesalers and retailers, petrol forecourts, and motorway services, whereas only [10-20] per cent of Maxinutrition sales are to the same customer base.

21. The parties also submitted that there would be no incentive to, or effect of engaging in anticompetitive tying/bundling, particularly since the markets are highly competitive with strong players who have significant market power to constrain the merged firm.
22. Although some customers considered Lucozade to be a 'must stock' sports and energy brand, and Maximuscle a 'must stock' sports nutrition brand, others noted that there are several alternative brands they could switch to in the event of a price increase. Supermarket customers confirmed that, even when they stock both types of products, they are located in different sections of their stores, such that they do not compete for retail space. Overall, no third parties raised any concerns about the merged firm's ability to engage in tying or bundling post-transaction.
23. The OFT does not consider that the merger creates or strengthens the ability of the merged firm to foreclose others by tying or bundling. In particular, the OFT notes that the customer base and distribution channels for sports and energy drinks are significantly different from that of sports nutrition products. The OFT therefore does not believe that the proposed transaction creates a realistic prospect of a substantial lessening of competition based on conglomerate effects.

## **BARRIERS TO ENTRY**

24. Given the lack of competition concerns in this case, the OFT does not need to assess entry barriers arising in the markets.

## **THIRD PARTY VIEWS**

25. No material third party concerns were raised.

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<sup>5</sup> Based on 2010 Euromonitor Health Data. The parties argued that, in fact, far greater sales of sports nutrition products take place through internet retailing and specialist outlets, such as Holland & Barrett. For example, [55-65] per cent of Maximuscle sales are through direct online sales, specialist healthcare and health food shops.

## **ASSESSMENT**

26. The parties overlap in the supply of sports and energy drinks, the supply of sports nutrition products, and the supply of certain intermediate products. The OFT does not consider it necessary to define the precise product scope in this case since no material competition concerns arise on any eventuality. The OFT considers that the relevant geographic scope is national.
27. GSK is the main supplier of sports and energy drinks in the UK via its Lucozade brand, but is a nominal supplier in the supply of sports nutrition products (having a market share of less than one per cent). Maxinutrition is the leading supplier of sports nutrition products through its Maximuscle brand, but is a nominal supplier in the supply of sports and energy drinks (having a market share of less than one per cent).
28. The OFT does not consider that conglomerate effects arise in this case since it does not believe that the merger creates or strengthens the ability of the merged firm to foreclose others by tying or bundling.
29. No material third party concerns were raised with respect to the proposed transaction.
30. The OFT therefore does not believe 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 UK.

## **DECISION**

This proposed transaction will **not be referred** to the Competition Commission under section 33(1) of the Act.