

Completed acquisition by Reckitt Benckiser Inc of certain assets of Combe Incorporated, namely specified Combe sore throat and skincare products

ME/4703/10

The OFT's decision on reference under section 22(1) given on 30 November 2010. Full text of decision published 9 December 2010.

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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. **Reckitt Benckiser Inc. (Reckitt)** is active worldwide in the manufacture and sale of various household products including fabric care; surface care; dishwashing; and other homecare products. Reckitt is also active worldwide in the manufacture and sale of health and personal care products, including food, pharmaceutical products and over the counter (OTC) pharmaceutical products.
2. **Combe Incorporated (Combe)** is a company active in male hair colour products, male grooming products, female hygiene products, footcare, denture care, skincare and oral care/sore throat products. The assets being sold to Reckitt include its sore throat and skincare products. Combe's sore throat products are only sold in the United States and Canada while its skincare products are sold in North America as well as in various EU Member States, including the UK. The UK turnover of the acquired assets for the last financial year was approximately £[ ] million (US\$[ ] million).

## **TRANSACTION**

3. Reckitt has acquired certain specified assets relating to sore throat and skincare products from Combe. The Asset Purchase Agreement was signed on 25 August 2010. The assets essentially consist of intellectual property

rights, product registrations and licences, related know-how, goodwill, product inventory, and customer and supplier contracts (the 'Target Assets'). No manufacturing plants, other real property, machinery or equipment are included.

4. The parties notified the merger on 6 October 2010, and the administrative deadline for a decision is therefore 1 December 2010. The transaction was completed on 15 November 2010 and the statutory deadline is therefore 14 March 2011.

## **JURISDICTION**

5. As a result of this transaction Reckitt and the Target Assets – which the OFT regards as an 'enterprise' for the purposes section 23(1) of the Enterprise Act 2002 - have ceased to be distinct. In the UK, the parties overlap in the supply of antipruritics and topical corticosteroids. The parties' combined share of supply will exceed 25 per cent for both these product categories in the UK. The share of supply test in section 23 of the Act is therefore met.
6. The OFT therefore believes that it is or may be the case that a relevant merger situation has been created.

## **RATIONALE**

7. The parties submit that the rationale for the acquisition is to enable Reckitt to increase its global oral and skin care product offering, in particular in North America, where the Target Assets generate a significant proportion of their worldwide turnover.

## **BACKGROUND**

### **Reckitt Benckiser/SSL merger**

8. On 21 July 2010 Reckitt announced an offer under the UK Takeover Code to purchase the entire issued share capital of SSL International plc (SSL). This merger was notified to the European Commission (Commission)<sup>1</sup> and was subsequently cleared subject to conditions.<sup>2</sup> SSL is predominantly

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<sup>1</sup> Case M.5953 *Reckitt Benckiser/SSL* on 6 September 2010.

<sup>2</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1378>

active in the personal care sector. It also sells some OTC pharmaceutical products, primarily in the UK and Ireland, including analgesics, head-lice treatments and stomach remedies, as well as products for sore throats, coughs, ear wax, mouth pain and burns to the skin.

9. In that case the parties overlapped in several pharmaceutical product areas, including the manufacture of antipruritics for a UK (national) market. The combined market share of the merged entity stood at [20-30] per cent (increment [zero-10] per cent). The Commission did not consider that the Reckitt/SSL merger transaction raised competition concerns for the UK market for antipruritics.

## **MARKET DEFINITION**

### **Product scope**

10. In the UK, the parties overlap in the supply of antipruritic and topical corticosteroid OTC products. OTC refers to those pharmaceutical products that can be purchased by consumers without a prescription. These will include pharmacy-only medicines, which can only be dispensed under the supervision of a qualified pharmacist, and general sales list products, which do not have to be dispensed by a pharmacist and are sold through a wide range of retail outlets.<sup>3</sup> OTC medicines have typically been considered as a separate product market from prescription medicines.<sup>4</sup> This distinction is justified by reference to the differences between OTC and prescription medicines in terms of medical indications, side effects, legal framework, distribution and marketing, despite products across the categories at times containing the same active ingredients.
11. The Target Assets include, in the UK, the Lanacane and Lanacort brands. Lanacane is an ATC3 class D4A antipruritic product (itch relief).<sup>5</sup> Reckitt is also active in the OTC antipruritics market, supplying E45 Itch Relief, Wasp-Eze and Burn-Eze. Combe's Lanacort, is a topical corticosteroid in

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<sup>3</sup> ME/1356/04 Phoenix Healthcare Distribution Limited/East Anglian Pharmaceuticals Limited (2004)

<sup>4</sup> Case M.5295 Teva/Barr (2008)

<sup>5</sup> In pharmaceutical merger cases, it is standard practice amongst established competition authorities to refer to the third level of the 'Anatomical Therapeutic Chemical' classification (ATC), compiled by the European Pharmaceutical Marketing Research Association in collaboration with International Medical Statistics, as a starting point in the definition of relevant markets. The ATC has a hierarchical structure and its third level groups medicines in terms of their intended therapeutic use.

ATC3 class D7A, which overlaps with Reckitt Benckiser's HC45, which is also a topical corticosteroid product.

### **Product market definition according to ATC classification**

12. The parties submitted that a product market definition based on the ATC3 classes D4A and D7A would be the correct approach for the purposes of the merger assessment. This follows Commission precedent, which has, in previous cases, concluded that the relevant product market for topical antipruritic products to be ATC3 D4A,<sup>6</sup> while that for topical corticosteroid products to be D7A.<sup>7</sup>
13. Products in ATC3 D4A class include topical preparations for the relief of skin irritation (itching, insect bites, eczema, etc) which may contain antihistamines, anaesthetics, or other active ingredients. ATC3 D7A class topical corticosteroids include dermatological products that contain one or more corticosteroids and no other active ingredients. ATC3 class D7A products exclude those with topical corticosteroid combinations, which are separately classified under D7B.

### **D4A products**

14. Third parties views were mixed as to whether the topical antipruritics market should be delineated according to the ATC level 3 classification. Several parties argued that some products in the D4A class were aimed specifically at treating insect bites, stings and rashes, whereas the overlapping products are aimed at treating itchy, irritated or inflamed skin caused by eczema, dermatitis, pruritus and other dry skin conditions. Sales volume data suggests that these arguments had some validity, given the fact that demand for products aimed at stings and bites peaked during the summer months, whereas demand for E45 anti-itch cream peaked in the winter months. This is indicative of different end-uses for these products. Therefore in the analysis that follows, the extent to which D4A products constrain each other is considered.

### **D7A products**

15. Third parties were broadly in agreement with the definition of the relevant product market around the ATC level 3 D7A class, since these products all

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<sup>6</sup> Case M.2922 Pfizer/Pharmacia (2003)

<sup>7</sup> Case COMP/M.5253 SANOFI-AVENTIS / ZENTIVA

contain hydrocortisone. A third party suggested that Reckitt's HC45, Combe's Lanacort and Novartis's Eurax Hydrocortisone Cream were the only topical corticosteroid products specifically indicated for eczema, dermatitis and bites and stings. Taking this as a product definition the merger would create a combined share of [85-95] per cent, with an increment of [zero-10] per cent. However, third party responses suggested that this way of splitting the market was not considered important to end consumers, and the distinction was not raised by any other third parties contacted. Therefore in the OFT's analysis the D7A class is taken as the relevant product market.

### **Product market definition across ATC level 3 classification**

16. A number of third parties suggested that the products under consideration may face constraints from other products outside the respective ATC3 class. For example it was suggested that Lanacane competes with Bayer's Canesten, which is an ATC3 D1A product, aimed at irritations from fungal infections. Brand analysis data<sup>8</sup> provided by the parties offered some support for this broader market definition, including products outside the D4A and D7A classifications

### **Conclusion on product scope**

17. Following Commission precedent the ATC3 delineation has been taken as the starting point for the analysis of this merger. However, given the arguments made by third parties, together with the data provided by the parties, the OFT has also considered the constraints posed by products outside the relevant ATC3 classes. However, as the transaction does not give rise to competition concerns on any plausible market definition, there has been no need to conclude on the relevant product market.

### **Geographic scope**

18. In previous merger cases the Commission has defined the markets for pharmaceutical products, including OTC products, as national in scope, because they show wide differences in terms of regulatory frameworks, pricing mechanisms, purchasing policies, and marketing strategies across Member States.

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<sup>8</sup> AC Nielsen sales data, which presented market shares across a broader definition of the antipruritics market including topical corticosteroid products (D7A) and other hydrocortisone based products such as Bayer's Canestan (D1A)

19. Neither the parties nor third parties submitted any contrary evidence to this view. Therefore, in line with previous decisions by the Commission, the OFT has assessed this merger on the basis of a national geographic frame of reference. However, given the lack of competition concerns in this case, the geographic scope of the relevant markets can be left open.

## **COMPETITIVE ASSESSMENT**

20. The parties overlap in the supply of OTC antipruritic products classified as ATC3 D4A (anti-itch) and topical corticosteroid products classified as ATC3 D7A.

### **Unilateral effects**

#### **Topical antipruritics – D4A**

21. Reckitt's antipruritic product is marketed under the E45 brand. E45 Itch Relief Cream is a treatment for itchy, irritated or inflamed skin caused by eczema, pruritus and other dry skin conditions. The recent acquisition of SSL added the Wasp-Eze and Burn-Eze brands, which are designed to treat itching from stings and burns respectively, to Reckitt's portfolio of D4A products.
22. Combe's Lanacane cream is designed to treat a number of conditions involving itching, including dry skin conditions, eczema, female itching, insect bites and stings, and heat rash. Other topical antipruritics include Novartis' Eurax anti itch cream, designed to treat a range of conditions similar to Lanacane and Sanofi-Aventis' Anthisan, aimed at relieving itching from insect stings and bites, and rashes.
23. Table 1 below sets out the parties' estimates of market share based on IRI data for value and volume for the year July to June 2009-10.

**Table 1: Antipruritics (D4A) UK market shares (per cent)**

		July 2009-10	
Company	Brands	Value	Volume
Reckitt Benckiser/SSL	E45 Itch Relief, Wasp-Eze, Burn-Eze	[20-30]	[20-30]
Combe	Lanacane	[0-10]	[0-10]
<b>Combined</b>		<b>[30-40]</b>	<b>[30-40]</b>
Novartis	Eurax, Savlon, Lypsyl	[10-20]	[10-20]
Sanofi-Aventis	Anthisan	[10-20]	[10-20]
EC De-Witt & Co	Witch Doctor	[0-10]	[0-10]
Omega Pharma	Jungle Formula	[0-10]	[0-10]
Dendron	Magicool	[0-10]	[0-10]
Others		[20-30]	[20-30]
<b>Total</b>		<b>100.0</b>	<b>100.0</b>

Source: Parties from IRI data. Total may not add up to 100 per cent due to rounding

24. The parties also provided AC Nielsen sales data, which presented market shares across a broader definition of the antipruritics market, and included topical corticosteroid products (D7A) and other hydrocortisone based products such as Bayer's Canesten, which is ATC3 D1A product, aimed at relieving itching from fungal infections. On this basis, the merged entity has a combined market share of [40-50] per cent (increment of [zero-10] per cent). Given that Table 1 above includes products designed for targeting specific conditions such as itching from insect bites and stings (for example Wasp-Eze and Anthisan), the OFT considers that the market shares produced from this broader market definition as being more representative of competitive conditions in the antipruritics market.

**Chart 1: Market shares in UK antipruritics sales (2009)**

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Source: Parties based on AC Nielsen data

25. While market share data is likely to be indicative of the degree of market power pharmaceutical firms possess, this is likely to arise from strong brand loyalty by end customers. These products are highly differentiated and

market share data may not be useful in assessing competitive conditions in the market. In the analysis that follows, the OFT has considered the degree of competition between Reckitt and the acquired brands.

### **Competition in the D4A class**

26. The parties submitted that E45 Itch Relief Cream, Wasp-Eze and Burn-Eze targeted different specific conditions. This was confirmed by third parties.<sup>9</sup> As such there were differing seasonal fluctuations in demand, for example, Wasp-eze and Burn-eze achieve peak sales during the summer months, together with Anthisan, Witch Dr and Jungleform. As these products are intended for use on a subset of conditions, they may offer only a limited constraint to the merged entities' E45 anti itch and Lanacane products. Therefore the OFT's analysis has concentrated on the competitive interaction between E45, Lanacane, Eurax and other products outside the D4A class that may compete with these.
27. The parties contend that E45 Itch relief cream and Lanacane are not close competitors, since the two products contain different active ingredients to anaesthetise the skin (Lauromacrogols and Benzoicane respectively). Several third parties, however, stated that E45 Itch relief cream and Lanacane were close substitutes, since both provided relief from itching by anaesthetising the skin around the affected area. Since end consumers are likely to consider antipruritics on the basis of the condition that the product targets, it is therefore unlikely that the different active ingredient in the two overlapping products will significantly differentiate them to consumers.
28. Third parties suggested that there is strong brand loyalty for branded D4A OTC products, and that end consumers were unlikely to switch from a product previously used. On this basis, third parties considered that the addition of Lanacane to the Reckitt portfolio was unlikely to substantially affect a typical consumer's D4A product choice. Third parties also commented that following the acquisition, sufficient alternative products remained, such as own label products (such as Aqueous Cream) and products outside the D4A class of antipruritics (for example Eumobase), to ensure a competitive market.

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<sup>9</sup> Wasp-Eze and Burn-Eze are aimed at relieving itching from insect bites and stings, and burns.

### **Third party comments**

29. Where relevant, third party comments have been incorporated above. In general, third parties did not express significant concerns over the transaction. No third party was concerned about the loss of competition between E45 itch relief and Lanacane.
30. One competitor suggested that the merger would result in Reckitt having a significant presence in the D4A sector, which may alter the balance of bargaining power and result in competing brands being squeezed out of shelf space. However as described above, end consumers appear to be loyal to certain brands and do not typically switch outside these. Retailers confirmed that de-listing of products would be extremely rare, given this consumer brand loyalty. Some retailers also raised concerns about increased seller power on the part of Reckitt on the basis of a broad range of skin products, which had already been enhanced by the SSL merger, however, the OFT does not consider that the addition of Lanacane, given the size of the increment, has changed this position significantly. Several retailers also suggested that they would be able to retain their bargaining position, since they could alter the amount of shelf space or the degree of prominence given to certain products (thereby affecting sales of a certain product), without having to de-list key branded products. Some retailers also offer own-brand alternatives to these products.

### **Conclusion on Unilateral Effects in the D4A market**

31. Third parties generally considered that the products of the merging parties were very similar and some customers and competitors referred to the similar chemical compositions of the products. One customer considered Lanacane to be the most similar product to E45 itch relief (however, this appeared to be because they had, to date, chosen not to stock any other products in this category). In general the OFT considered that these products were closer competitors than demonstrated by the market shares based on the IRI data.
32. Using sales data provided by third parties, the parties' shares ranged between [50-60] per cent and [65-75] per cent of the few products that were felt to be the closest competitors. However, retailers considered that they would not delist either E45 Itch relief or Lanacane due to brand loyalty on the part of the end consumer and that this level of brand loyalty

suggested that these products were not substitutes in the eyes of the end consumer, who would not switch between them. Retailers considered that they still had plenty of ability to resist price rises through negotiation with suppliers and the prominence they gave to the products store displays. US market data provided by the parties showed that Lanacane had lost share to private label products and had several SKUs de-listed.

33. From marketing, sales, and customer research documents for the UK supplied by the parties, there was no evidence that suggested that either E45 Itch relief or Lanacane competed directly against each other for retailer space or end consumers.
34. On the basis of the above points, the OFT believes that the merger will not result in a substantial lessening of competition with regard to the overlap in topical antipruritics.

#### **Topical corticosteroids (D7A)**

35. In the D7A class, Reckitt's products are sold under the HC45 brand, whilst Combe's are sold under the Lanacort brand. GlaxoSmithKline (GSK) is a major competitor in this segment, with its Eumovate products, and other active firms, include Biorex (Teva) with Zenoxone, and Pan Pharma with Dermacort.
36. Table 2 below sets out the parties' estimates of market share based on IRI data for value and volume for the year July to June 2009-10.

**Table 2: Topical corticosteroids (D7A) UK market shares (per cent)**

		July 2009-10	
Company	Brands	Value	Volume
Reckitt Benckiser	HC45	[30-40]	[30-40]
Combe	Lanacort	[0-10]	[0-10]
<b>Combined</b>		<b>[35-45]</b>	<b>[35-45]</b>
GSK	Eumovate	[30-40]	[20-30]
Biorex (Teva)	Zenoxone	[0-10]	[0-10]
AAH (own label)	Vantage	[0-10]	[0-10]
Pan Pharma	Dermacort	[0-10]	[0-10]
Pinewood	Execort	[0-10]	[0-10]
Own label		[10-20]	[20-30]
<b>Total</b>		<b>100.0</b>	<b>100.0</b>

Source: Parties from IRI data. Total may not add up to 100 per cent due to rounding up.

### **Competition in the D7A market**

37. The parties submitted that following the merger sufficient competition remained in the D7A class, in particular from GSK, a large global OTC player with significant presence in this market.
38. The parties also commented that non D7A products may pose a competitive constraint on the merged entity. For example, for end consumers with eczema or dermatitis, depending on the severity of the condition, other options available may include emollients for mild conditions or prescription medicines for more advanced conditions, including medicines from the D7A prescription segment. The parties also stated that products from the D7B (topical corticosteroid combinations) segment may also compete with D7A products. These products include Novartis's Eurax HC cream, Bayer's Hydrocortisone and McNeil's Daktacort Hydrocortisone Cream.
39. Third parties suggested that HC45 and Lanacort were very similar products and as such close competitors. However, third parties also suggested that competition may extend beyond the D7A segment, with some parties suggesting that Eurax HC cream and Daktacort Hydrocortisone cream are substitutes for the products under consideration.

### **Third party comments**

40. Where relevant, third party comments have been incorporated above. In general, third parties did not express significant concerns over this overlap. No third parties felt that Lanacort was a key brand that acted as a constraint on HC45 (reflected in the share figures). Although some third parties considered HC45 and Lanacort as very close substitutes, others commented that products outside the D7A segment were also credible substitutes.

### **Conclusion on Unilateral Effects in the D7A market**

41. The merger creates a combined share of [35-45] per cent (increment less than one per cent) by value or [35-45] per cent (increment [zero-10] per cent) by volume. While third parties saw the products as close competitors, Lanacort was not considered a key brand, and, as its shares suggest, was not considered to act as a constraint on HC45. GSK's Eumovate, on the other hand, was considered a significant constraint on the parties with shares of [30-40] by value and [20-30] by volume. Third parties also pointed to products outside the D7A segment that were also considered to be credible substitutes.
42. On the basis of the above points, the OFT believes that the merger will not result in a substantial lessening of competition with regard to the overlap in topical corticosteroids.

### **Coordinated effects**

43. No third parties raised concerns about co-ordinated effects.

### **ASSESSMENT**

44. Reckitt is buying certain sore throat and skin care brands from Combe. While the transaction focuses on the US, it does involve some brands present in the UK, namely Combe's Lanacane and Lanacort brands.
45. As a result of the merger the parties overlap in ATC3 class topical antipruritics (D4A), where the combined market share is [30-40] per cent (increment [zero-10] per cent) by value – lower in volume due to private label sales, and in ATC3 class topical corticosteroids (D7A) where the

combined market share is about [35-45] per cent (increment [zero-10] per cent) by volume.

46. The market perspective used by AC Nielsen may be more appropriate since it presented market shares across a more comprehensive and treatment driven definition of the antipruritic market and excluded the stings and bites treatments listed under the D4A category. Based on AC Nielsen data the merged firm had a [40-50] per cent share (increment [zero-10] per cent).
47. Retailers suggested that the parties' brands E45 itch relief and Lanacane were relatively close competitors in terms of the medical indications they treated, but no retailer raised any concerns that these were considered as substitutes either for themselves or final consumers. This perceived lack of direct competition between the brands was consistent with internal documents that made no mention of competition and a lack of market evidence from competitors. While these are differentiated products, and retailers suggested that they would be unwilling to delist brands due to consumer brand loyalty, retailers felt they could make any price rises unprofitable for the merged firm by reducing stock levels or changing shelf prominence.
48. In the D7A market the OFT did not consider a very narrow market definition (including the merging products and a product outside the ATC class) to be appropriate, because consumers did not appear to purchase on the basis of chemical similarity (or range of conditions), but on the basis of treatment for a particular condition. Further the increment within the D7A segment is very small and Lanacort was considered by third parties to be a weak brand.
49. While third parties expressed some concerns about conglomerate issues or the ability of Reckitt to block access to retailers for other competitors, none were expressed strongly or supported with evidence and the small increment and relatively weak brand acquired was not considered strong enough to support any changes in this respect.
50. Consequently, the OFT does not believe that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

## DECISION

51. This merger will therefore **not be referred** to the Competition Commission under section 22(1) of the Act.