

# ANTICIPATED ACQUISITION BY RECKITT BENCKISER GROUP PLC OF THE K-Y BRAND IN THE UK

## Notice of possible remedies under Rule 12 of the CMA's Rules of Procedure for Merger, Market and Special Reference Groups

### *Introduction*

1. On 7 January 2015, the Competition and Markets Authority (CMA), in exercise of its duty under section 33(1) of the Enterprise Act 2002 (the Act), referred the anticipated acquisition by Reckitt Benckiser Group plc (RB) of the K-Y enterprise (the UK K-Y business)<sup>1</sup> from McNeil-PPC, Inc., a subsidiary of Johnson & Johnson (J&J), for further investigation and report by a group of CMA panel members (the inquiry group).
2. In its provisional findings on the reference notified to RB and J&J (the main parties) on **22 May 2015**, the CMA, *inter alia*, provisionally concluded that the acquisition would result in the creation of a relevant merger situation, and that the creation of that situation would be expected to result in a substantial lessening of competition (SLC) in the UK markets for the supply of personal lubricants to grocery retailers and national pharmacy chains.
3. It was expected that this would lead to adverse effects, for example in the form of higher prices than would otherwise be the case, absent the merger.
4. This Notice sets out the actions which the CMA considers it might take for the purpose of remedying the SLC and any resulting adverse effects identified in the provisional findings. The CMA invites comments on possible remedies by **5 June 2015** (see note (i)).

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<sup>1</sup> The assets being acquired include, *inter alia*, inventories, moulds, certain IP rights and data, designs, specifications and other documents and contracts relating to the K-Y brand.

## **Criteria**

5. In choosing appropriate remedial action, the CMA shall have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it.<sup>2</sup> When deciding on an appropriate remedy, the CMA will consider the effectiveness of different possible remedies and their associated costs and will have regard to the principle of proportionality. Between two remedies that the CMA considers equally effective, it will choose that which imposes the least cost or restriction. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.<sup>3</sup>

## **Possible remedies on which views are sought**

6. In merger inquiries, the CMA will generally prefer structural remedies, such as divestiture or prohibition, rather than behavioural remedies because:
  - (a) structural remedies are likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;
  - (b) behavioural remedies may not have an effective impact on the SLC and its resulting adverse effects, and may create significant costly distortions in market outcomes; and
  - (c) structural remedies do not normally require monitoring and enforcement once implemented.<sup>4</sup>
7. At this stage the CMA has provisionally identified the following potential structural remedies:
  - (a) prohibition of the acquisition of the UK K-Y business by RB (prohibition);
  - (b) divestiture by J&J to a party other than RB of the UK K-Y business (UK divestiture); and
  - (c) licensing of the relevant rights for the UK K-Y business to a party other than RB (UK licensing).
8. The CMA will consider whether any of these remedies or a combination of them (or variants of them) may be appropriate.

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<sup>2</sup> Section 36(3) of [the Act](#).

<sup>3</sup> [Merger Remedies: Competition Commission Guidelines](#), CC8, November 2008, paragraph 1.9. This has been adopted by the CMA Board.

<sup>4</sup> [Merger Remedies: Competition Commission Guidelines](#), paragraph 2.14.

### *Prohibition*

9. The CMA considers that prohibition could prevent an SLC from arising. However the acquisition has completed, following clearance (where required), in approximately 50 countries (the Commerce Commission in New Zealand has declined to clear the merger in New Zealand). The CMA considers that as J&J has completed the transaction in most jurisdictions, there is a risk that J&J would have a reduced incentive to continue to support and invest in the UK K-Y business such that it would be an effective competitor in the UK.
10. The CMA therefore takes the view that prohibition on its own would have the risk (in terms of its effectiveness in addressing the potential SLC) of creating a situation in which the UK K-Y business no longer competes effectively against RB's range of personal lubricant products.
11. Nevertheless, the CMA invites views on the effectiveness of prohibition in addressing the provisional SLC.

### *UK divestiture or UK licensing*

12. The CMA considers that the options of UK divestiture and/or UK licensing would be more likely to provide a comprehensive solution to the SLC it has provisionally found and that these remedy options have fewer risks in terms of effectiveness.
13. The CMA invites views on the effectiveness of these potential remedies and in particular on:
  - (a) *the scope of the UK divestiture or licensing package:*
    - (i) What criteria should be used to determine the scale and scope of the divestiture or licensing package, including whether divestiture and/or licensing of the UK rights to the brand, rights, liabilities and assets acquired from J&J would be sufficient to address the SLC we have provisionally found?
    - (ii) How extensive should the purchaser's (a party other than RB) rights over the brand be – ie should the purchaser be able to use the K-Y brand for other products, or use the K-Y brand in conjunction with another brand?
    - (iii) What protection would RB and the purchaser receive over the use of the brand, in terms of the purchaser exporting K-Y products out of the UK or RB importing K-Y products into the UK?

- (iv) What measures are needed to avoid potential conflicts between the rights of the purchaser of the UK rights and the rights held by the owner of the K-Y brand elsewhere?
  - (v) Should the UK divestiture be permanent or should it consist of a time-limited licensing agreement (for example for a period of ten years)?
- (b) *identification of a suitable purchaser:* the CMA will wish to satisfy itself that a prospective purchaser has no significant connection to the merger parties that may compromise the purchaser's incentives to compete; has access to appropriate financial resources, expertise and assets; has an appropriate business plan (including proven access to suitable production facilities); and creates no competition concerns;<sup>5</sup> and
- (c) *effective divestiture and/or licensing process:* the CMA will consider the appropriate timescale for achieving a divestiture and/or licensing (the Divestiture Period) and what procedural safeguards would be needed to minimise the risk associated with these remedy options, including the use of a Divestiture Trustee to divest any operations not divested within the Divestiture Period.

#### *Other potential remedies*

14. The CMA's current view is that a behavioural remedy, such as a price cap on K-Y products in the UK, by itself is unlikely to be an effective remedy for the following reasons:
- (a) This would not address the provisional SLC that we have identified by restoring rivalry.
  - (b) It would be difficult to determine the correct starting price for the price cap.
  - (c) There would be a substantial risk of circumvention by the parties, for example by changing the formula or packaging to create a 'new' product.
  - (d) Such a remedy would be likely to require costly monitoring and enforcement.
15. The CMA invites views on these remedy options (or a combination of them) and will consider any other practicable remedies – structural or behavioural –

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<sup>5</sup> *Merger Remedies: Competition Commission Guidelines*, paragraph 3.15.

that are proposed in order to address the provisional SLC and resulting adverse effects.

### ***Relevant customer benefits***

16. The CMA will have regard to the effects of remedial action on any relevant customer benefits within the meaning of section 30 of the Act arising from the merger situation. Such benefits might comprise lower prices, higher quality or greater choice of goods or services or greater innovation in relation to such goods or services. A benefit is only a relevant customer benefit if the CMA believes that: (a) the benefit has accrued as a result of the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period as a result of the creation of that situation; and (b) the benefit was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.
17. The CMA welcomes submissions with supporting evidence on the nature of any relevant customer benefits and on the scale and likelihood of such benefits and the extent to which these are preserved by the different remedy options being considered.

### ***Next steps***

18. The main parties and interested third parties are requested to provide any views in writing, including any practical alternative remedies they wish the CMA to consider, by **5 June 2015** (see note (i)).
19. A copy of this Notice will be posted on the [CMA's webpages](#).

*(signed) [PHIL EVANS]*

*Deputy Chairman and Chairman of the Group*

22 May 2015

### ***Note***

- (i) This Notice of possible actions to remedy the SLC and any resulting adverse effects is given having regard to the provisional findings announced on **22 May 2015**. The main parties have until **12 June 2015** to respond to the provisional findings. The CMA's findings may alter in response to comments it receives on its provisional findings, in which case the CMA may consider other possible remedies, if appropriate.