

RECKITT BENCKISER/K-Y BRAND MERGER INQUIRY

Summary of response hearings with Pasante

Summary of response hearing on 5 June 2015

Views on the CMA's provisional findings

1. Pasante thought the provisional findings were accurate.

Prohibition of the merger

2. Pasante said prohibition of the merger was sensible. If Reckitt Benckiser (RB) owned the K-Y brand, it would mean RB had the entire UK market in personal lubricants. By contrast, if Ansell had the K-Y brand, this would not be a problem because Ansell did not have a big presence in the UK lubricant market.
3. Pasante said that if a company other than RB owned the K-Y brand, this would develop and encourage competition. It would be disastrous if RB obtained the K-Y brand in the UK.
4. Pasante did not know what Johnson & Johnson (J&J) would do with the K-Y brand if the merger was prohibited. It might not be worthwhile for J&J to operate the K-Y brand only in the UK.

Divestiture of the K-Y brand

5. Pasante said it would be good if another company bought the K-Y brand in the UK. J&J had not invested in the K-Y brand in the UK, but had developed a range of K-Y products in America.
6. Pasante said there would be many buyers for the K-Y brand. Pasante would be interested in buying the K-Y brand. Pharmaceutical companies would also be interested, [redacted]. Many companies who supplied pharmacies and retailers would be interested in owning an established brand like K-Y.
7. Pasante said any potential expansion of the K-Y brand would depend on the type of buyer. Many pharmaceutical companies were run by venture capitalists who might just 'milk' the K-Y brand. If Pasante bought the K-Y brand, it would want to develop it.

8. Pasante said any divestment package for the K-Y brand should include the K-Y customer list, stock, suppliers and formulation, and the undisputed right to use the K-Y trademark. It would also be necessary for any buyer to have a consistency of supply of K-Y for a certain period. Any buyer would need access to the manufacturing of K-Y for a limited period until it could make its own manufacturing arrangements.
9. Pasante said that whether or not a buyer would want to produce K-Y itself or sub-contract production to RB would depend on cost. Most manufacturing was now done in China because it was cheaper.
10. Pasante said it would not be necessary for any buyer of the K-Y brand to have produced personal lubricants before. K-Y was a very common class II medical device rather than a class III device or medicine.
11. Pasante said it would be difficult to control imports and exports of K-Y if there was a divestment of the K-Y brand. There was no trade restriction within Europe, so RB's French division would be able to sell its K-Y products in the UK. Concerns about imports from Europe would need to be addressed in the licensing agreement.
12. Pasante gave an example of selling products for another company under licence in the UK. Pasante explained that if it sold these products outside the UK, for example in France, it had to pay a far higher licence fee, which deterred it from doing so. The licensing company knew of such sales because Pasante had to declare all its sales of the products. However, it might be difficult to restrict onward sales of the products. Pasante said there were lots of 'grey' imports.
13. Pasante said that if the K-Y brand was divested, an agreement would be needed to address the issue of imports and exports. This agreement could include a 100% penalty for any sales outside the territory.
14. Pasante said any new owner of the K-Y brand in the UK would need to own all K-Y products in the UK. If Pasante bought K-Y personal lubricants in the UK, it would not want somebody else selling K-Y condoms or other K-Y products.
15. Pasante said the scope for any buyer to combine the K-Y brand with its own brand (co-branding of products) depended on the strength of the buyer's brand. K-Y was a very strong brand in its own right, with strong brand appeal.

Licensing of the K-Y brand

16. Pasante said that if someone else owned the K-Y brand under licence for a limited time period, this would restrict investment in the brand. Licensing could result in the licensee 'milking a cash cow', although this would depend on the length of the licence. If the licence was for 25 years, the licensee would invest in the K-Y brand.
17. Pasante said that, to ensure investment in the K-Y brand, any licence would need to be for a minimum period of ten years, with opportunity to extend the licence. It would also be necessary to have the scope to start renegotiating the licence after seven years so there could be certainty of a licence for a further ten years. The terms of the licence would be important.
18. Pasante saw a problem if RB licensed the K-Y brand to another company and then competed with it through its Durex personal lubricants. Given these circumstances, any licence should be unrestricted with no targets and a nominal fee, eg £25,000 per year. Any licence should be awarded to somebody who would develop the K-Y brand. Under any licence, it was important that there was no interference from RB because it was also a competitor.
19. Pasante said a ten-year period for any licence would be sufficient so long as the licence period could be extended. There should be scope for re-licensing of the K-Y brand. There should not just be a licence to cover a difficult situation after which RB could take over the K-Y brand.
20. Pasante said fewer people might be interested in obtaining a licence for the K-Y brand than buying it outright, but there would be interest in both options at the right price.

Behavioural remedies

21. Pasante said price caps were not very effective.

Any benefits from the proposed acquisition

22. Pasante could not think of any major benefits from RB's proposed acquisition of the K-Y brand. It was possible that the K-Y formulation and packaging might improve slightly, but this possible benefit had to be considered alongside RB dominating the UK personal lubricant market.
23. Pasante said it would be good if the K-Y brand was available for other companies to buy. This would be an exciting opportunity for UK companies who could develop the K-Y brand.

Summary of response hearing on 13 July 2015

24. Pasante said that, under a short-term licensing remedy, it could be difficult for the licensee to establish a new brand at the end of the licence period. K-Y was a good brand that RB could easily re-launch at the end of the licence period. Pasante said that, under a short-term licensing deal, it could use the K-Y brand to build up its own existing sterile personal lubricant product but once K-Y returned to RB, consumers would switch to buying K-Y again because it was a market leader. Pasante said it would not make commercial sense for a small company to spend four years marketing and brand-building to then have K-Y returned to a major company.
25. Pasante said it was very difficult to launch a new brand in the personal lubricant market because retailers only had space for one or two brands. Pasante said a longer duration for the licence such as nine years, with a one-year black-out period, could provide time to establish a new brand, but a duration of four years would be too short because there would need to be negotiations with retailers before any new brand was listed.
26. Pasante said any licence would be more attractive to companies with existing personal lubricant products. A company without an existing personal lubricant product would have to spend money on clinical trials and testing any product.
27. Pasante said there could be Intellectual Property (IP) issues to resolve for a licensing agreement. Pasante said 'grey' imports of K-Y products had been an issue in the past, and any licensee would need some kind of protection in the licence to address this issue. Pasante said this issue could be addressed through the imposition of financial penalties for either party if there were found to be sales of their K-Y products outside of their territories.
28. Pasante outlined elements that should be included in any licence. These included: provision for the licensee to develop the K-Y product; transfer of existing K-Y supply contracts; transitional supply of K-Y for an initial period; provision to continue supply of sterile K-Y to the NHS; and no uplift in royalty fees. Pasante said the critical issues for any licence would be the cost, the length and the information to be supplied to RB, given it was a competitor.
29. Pasante said any licensing arrangement could have a slightly negative impact on existing small suppliers in the personal lubricant market because a new co-branded K-Y product might outsell their products.
30. Pasante said any licensing agreement could be negotiated within some months. Pasante said a major issue might be obtaining RB's approval for developing any new product because it could be in RB's interest to inhibit

development of the product. Pasante also stressed RB's scope to invest heavily in the relaunch of the K-Y brand at the end of any licence period.

31. Pasante said there would be no difficulty in supplying sterile K-Y to the NHS. Pasante was already listed as a preferred supplier with NHS Supply Chain and it was not difficult for it to switch suppliers. Pasante said inclusion of the requirement to supply the NHS would make any licence more attractive because the NHS was a good market.
32. Pasante said it could not see any benefits from RB's proposed price cap remedy. Pasante said it would not change the existing situation of limited competition because RB would own both Durex and K-Y brands and it would not give any incentive for new entry or innovation in the market.