

Anticipated acquisition by NBTY Inc. of Dr Organic Limited

ME/6559/15

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 18 November 2015. Full text of the decision published on 14 December 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.

SUMMARY

1. NBTY Inc., through its wholly owned subsidiary NBTY (2015) Limited, (together **NBTY**) has agreed to acquire Dr Organic Limited (**Dr Organic**) (the **Merger**). NBTY and Dr Organic are together referred to as **the Parties**.
2. The Competition and Markets Authority (**CMA**) considers that the Parties' enterprises 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 wholesale supply of vitamins, minerals and supplements (**VMS**) to third parties in the United Kingdom (**UK**). NBTY supplies mainly through its Solgar brand and Dr Organic supplies through its Optima brand. NBTY also has interests at the retail level of the supply chain through its ownership of the Holland & Barrett, GNC and Met-Rx retail chains of health food stores (together **the Holland and Barrett Group**).
4. The CMA assessed the impact of the Merger against a frame of reference for the wholesale supply of VMS to third parties in the UK. The CMA also considered whether the competitive effects of the Merger would be more pronounced if the product frame of reference was further segmented to differentiate between VMS categories, retail channels or various ingestion methods. However, since no competition concerns arose under any of those

narrower segments, the CMA did not conclude on whether the segments were appropriate frames of reference.

5. The CMA investigated whether the Merger may be expected to result in a substantial lessening of competition (**SLC**) as a result of horizontal unilateral effects. The Parties' combined shares of supply in the wholesale supply of VMS in the UK, excluding NBTY's internal supply to the Holland and Barrett Group, are low (around [5–15]%) and the increment is below [0–5]%. Given that the combined shares of supply are low, the CMA focused on whether the Parties are particularly close competitors such that competition concerns may nonetheless arise. The evidence received by the CMA, including feedback from third parties, indicates that the Parties' product lines are not close alternatives. The CMA also received evidence showing that there will remain several competing suppliers in the UK with strong brands, which will continue to exert a competitive constraint on the merged entity. The CMA therefore concluded that the Merger does not give rise to a realistic prospect of an SLC in the wholesale supply of VMS in the UK.
6. The CMA also investigated whether the Merger may be expected to result in an SLC as a result of vertical effects relating to customer and/or input foreclosure, but found no concerns because of the Parties' low combined shares of supply at the wholesale level and the focus of NBTY's retail offering on its own-label VMS products.
7. On the basis of the above factors, the CMA considers that the Merger does not give rise to a realistic prospect of an SLC.
8. The Merger will therefore **not be referred** under section 33(1) of the Enterprise Act 2002 (the **Act**).

ASSESSMENT

Parties

9. NBTY is a vertically integrated manufacturer, marketer and distributor of nutritional supplements in the UK and worldwide. At the wholesale level in the UK, NBTY supplies branded VMS (primarily Solgar branded products) to the Holland and Barrett Group and to other retail customers, and it supplies own-label VMS to some retailers.¹ At the retail level in the UK, NBTY owns and operates the Holland and Barrett Group, which sells a range of health food and lifestyle products to consumers, including VMS, health food, cosmetic and

¹ [X] and [X].

personal care products. The Holland and Barrett Group sells both NBTY's brands and other manufacturers' brands. NBTY's UK turnover for the financial year ended 30 September 2014 was around £[X].

10. Dr Organic is a designer and worldwide distributor of personal care, body and bath products based in the UK. Dr Organic also own Optima Consumer Health Limited (**Optima**), which designs and distributes VMS products at the wholesale level in the UK. Optima also distributes a range of products, including personal care products, to pharmacists and health food outlets. Manufacturing is undertaken by third parties on behalf of, and under contract with, Dr Organic. The UK turnover of Dr Organic was £[X] in the financial year ended 31 December 2014, the UK turnover of Optima in the same period was £[X].

Transaction

11. NBTY has agreed to acquire full control of Dr Organic for a consideration of [X].

Jurisdiction

12. As a result of the Merger, the enterprises of NBTY and Dr Organic will cease to be distinct.
13. The Parties overlap in the wholesale supply of VMS in the UK, for which the Parties estimate they have a combined share of supply of [25–35]% (increment [0–5]%) based on the value of sales (including internal and external sales).² A significant proportion of NBTY's share of supply results from its internal supply to the Holland and Barrett Group, which the CMA has included for the purpose of determining whether the share of supply test is met.³ The CMA therefore considers that the share of supply test in section 23 of the Act is met.
14. 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.

² Merger Notice, paragraph 3.1.2.

³ Section 23(5) of the Act. See also paragraph 4.56 of [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), January 2014.

15. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 2 October 2015 so the statutory 40 working day deadline for a decision is 26 November 2015.

Counterfactual

16. The CMA assesses a merger's impact relative to the situation which 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.⁴
17. In this case, there is no evidence supporting a different counterfactual, and the Parties and third parties have not put forward arguments in this respect. Therefore, the CMA considers the prevailing conditions of competition to be the relevant counterfactual.

Frame of reference

18. 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 important than others. The CMA will take these factors into account in its competitive assessment.⁵

⁴ [Merger Assessment Guidelines](#) (OFT1254/CC2), September 2010, from paragraph 4.3.5. The [Merger Assessment Guidelines](#) have been adopted by the CMA (see [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), January 2014, Annex D).

⁵ [Merger Assessment Guidelines](#), paragraph 5.2.2.

Product scope

19. The Parties overlap in the wholesale supply of VMS to retailers. The CMA considered whether the wholesale supply of VMS could be further segmented to differentiate between:
- (a) VMS categories (Anatomical Therapeutic Chemical (**ATC**) classification or intended use);
 - (b) retail channels; and/or
 - (c) ingestion methods.

VMS categories

20. NBTY submitted that the European Commission had previously considered mergers involving suppliers of VMS on the basis of the relevant ATC classification (an ATC classification is available where the VMS product contains vitamins).⁶ NBTY noted that a distinction had been made at the ATC3 level (which has generally been used as a starting point for defining product scopes) between multi-vitamins with minerals and multi-vitamins without minerals. The Parties overlap only in the supply of multi-vitamins with minerals. Distinctions have also been made in previous cases at the ATC4 level (a further subdivision).⁷
21. NBTY also submitted that, for VMS products which did not contain vitamins and for which the ATC classification was therefore not available, the European Commission had previously segmented the market according to intended use (eg digestive, antioxidant, joint care).⁸
22. Table 1 shows the Parties' overlaps in relation to VMS products containing vitamins by ATC4 category and for products not containing vitamins by intended use.

⁶ The Anatomical Therapeutic Chemical Classification System with Defined Daily Doses (**ATC/DDD**) system classifies therapeutic drugs. The purpose of the ATC/DDD system is to serve as a tool for drug utilisation research in order to improve quality of drug use. In the ATC classification system, the drugs are divided into different groups according to the organ or system on which they act and their chemical, pharmacological and therapeutic properties. Drugs are classified into five different levels. Drug consumption statistics (international and other levels) can be presented for each of five levels. See World Health Organisation, [The Anatomical Therapeutic Chemical Classification System with Defined Daily Doses \(ATC/DDD\)](#).

⁷ CMA Decision: Perrigo Company / Omega Pharma Invest merger inquiry, March 2015, paragraph 25.

⁸ Case No COMP/M.2773: Nestle / L'Oreal / Inneov, 3 August 2010.

Table 1: Parties' products by VMS category

<i>VMS category</i>	<i>Overlap Category</i>	<i>NBTY active in UK wholesale</i>	<i>Target active in UK wholesale</i>
A11A Multi-vitamins with Minerals	Y	Y	Y
A11A1 Pre-natal	N	Y	N
A11A2 Paediatric	Y	Y	Y
A11A2 Geriatric	N	Y	N
A11A4 Other multi-vitamins with minerals	Y	Y	Y
Digestive	Y	Y	Y
Antioxidant	Y	Y	Y
Joint care	Y	Y	Y
Urinary tract	Y	Y	Y
Essential Fatty Acids	Y	Y	Y
Cognitive	Y	Y	Y

Source: Parties.

23. Third parties told the CMA that consumers purchase VMS products targeted at specific requirements and, therefore, substitution between narrow categories is likely to be limited.
24. The CMA also considered whether supply-side considerations warranted a wider frame of reference including all VMS categories.⁹ The CMA received a mixed response from wholesale competitors to its enquiry on the extent to which the wholesaler supplied a complete range of VMS products. For example, one competitor said that, although it supplied a range of VMS products, it did not supply products in all the main categories. By contrast, another competitor said that it supplied products from all the main VMS categories (by intended use) except one. Evidence from wholesale competitors was also mixed on whether switching their supplies to other VMS categories was easy.
25. Given this evidence, the CMA has considered the competitive impact of the Merger in the supply of individual VMS categories as well as in the overall supply of VMS across all categories. However, given that no competition concerns have been found on any basis, the CMA has not concluded on whether segmentation by ATC4 category or intended use is appropriate.

Retail channels

26. The Parties supply [X] to health food stores, [X] supply pharmacies and other retailers. The Parties submitted that these different retail channels compete against each other.
27. Third parties generally told the CMA that end consumers shop across all retail channels and that price changes in one channel could result in significant switching to other retail channels. However, third parties noted that small price

⁹ [Merger Assessment Guidelines](#) (OFT1254/CC2), September 2010, paragraphs 5.2.17–5.2.19

changes may not be sufficient to result in such switching and that deeper price cuts or other forms of promotion would be required in order to shift shopping habits.

28. Third parties also noted the importance of brand recognition. In this respect, the CMA notes that brand availability might vary by retail channel and, therefore, substitution between channels in the event of a small price rise in one channel could vary considerably.
29. The CMA noted some internal documents from NBTY which consider [✂].¹⁰
[✂]
30. On the basis of this evidence, the CMA has considered the competitive impact of the Merger in the supply of VMS through the different retail channels as well as across all channels. However, given that no competition concerns have been found on any basis, the CMA has not concluded on whether a segmentation by retail channel is appropriate.

Ingestion methods

31. The Parties submitted that Dr Organic juice products, which also have claimed health benefits, should not be included in the VMS categories as VMS products are ingested in tablet form whereas juice products are ingested as a liquid.
32. Third parties generally told the CMA that VMS products supplied in tablet form were likely to constitute a separate product market, since a small but significant non-transitory increase in price in VMS in tablet form would be unlikely to result in significant consumer switching to alternative forms, such as liquids.
33. On the basis of this evidence, the CMA has considered the competitive impact of the Merger in the supply of VMS in tablet form as well as all VMS including juice products. However, given that no competition concerns have been found on any basis, the CMA has not concluded on whether segmentation by ingestion method is appropriate.

Geographic scope

34. The Parties submitted that the European Commission had previously left the geographic market definition open in mergers involving suppliers of pharmaceutical and consumer health products. However, in these cases, the

¹⁰ Merger Notice, Annex 41, p23.

European Commission had generally considered the markets to be national in scope.¹¹

35. The CMA noted internal documents from NBTY which discuss its VMS product offering and its sales performance and observed that these documents [redacted]. The CMA also noted internal documents which [redacted].¹²
36. On the basis of this evidence, the CMA has considered the competitive impact of the Merger at the national level. However, given that no competition concerns have been found on any basis, the CMA has not concluded on the geographic frame of reference.

Conclusion on frame of reference

37. The CMA has assessed the impact of the Merger in the wholesale supply of VMS in the UK. The CMA has also considered whether the competitive effects of the Merger would be more pronounced if the product frame of reference was further segmented to differentiate between VMS categories, retail channels and various ingestion methods. However, since no competition concerns arise on any basis, the CMA has not concluded on the exact boundaries of the product or geographic frames of reference.

COMPETITIVE ASSESSMENT

Horizontal unilateral effects

38. Horizontal unilateral effects may arise when one firm merges with a competitor which 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.¹³ Horizontal unilateral effects are more likely when the merging parties are close competitors.
39. The CMA considered whether the Merger may give rise to horizontal unilateral effects in the wholesale supply of VMS to retailers in the UK.
40. The Merger's main effect is to reduce the number of suppliers at the wholesale level for branded VMS, by bringing under the same ownership the Solgar brand (owned by NBTY) and the Optima brand (owned by Dr Organic). NBTY, through the Holland and Barrett Group, also owns and operates the

¹¹ For example, in Pfizer/Ferrosolan, the European Commission considered the effects of the merger (with overlaps in food and nutritional supplements) at the national level. See paragraph 20 in Case No COMP/M.6162 - Pfizer/Ferrosolan Consumer Healthcare Business.

¹² Merger Notice, Annex 15, [redacted], pp7 & 17.

¹³ [Merger Assessment Guidelines](#), from paragraph 5.4.1.

Holland and Barrett, GNC and Met-Rx retail chains in the UK. Since own-label products sold by the Holland and Barrett Group are not available to competing retailers, the CMA has focused its competitive assessment of the Merger on the loss of competition in the supply of Branded VMS at the wholesale level (ie the CMA has excluded this ‘internal supply’ from its competitive assessment).¹⁴ However, the CMA has also taken into account the effect that NBTY’s presence at the retail level has on its incentives to increase prices of branded VMS at the wholesale level.

Shares of supply

41. The Parties estimated that their combined share of supply in the wholesale supply of VMS in the UK (excluding internal supply from NBTY to the Holland and Barrett Group) is around [5–15]%, with an increment arising from the Merger of less than [0–5]%. The shares of supply indicate that other significant suppliers would remain post-Merger, including Vitabiotics ([5–15]%), Merck ([5–15]%) and Bayer ([5–15]%), as shown in Table 2. Each of these competitors would have a larger share of supply than the merged entity.

Table 2: Share of wholesale VMS supply

Competitor	£m	%
	Sales	Share
NBTY	[£]	[0–5]
Holland and Barrett	[£]	[0–5]
Dr Organic	[£] ¹⁵	[0–5]
Combined	[£]	[0–5]
Vitabiotics	[£]	[5–15]
Merck	[£]	[5–15]
Bayer	[£]	[5–15]
Pfizer	[£]	[0–5]
Pharma Nord	[£]	[0–5]
Others	[£]	[55–65]
Estimated total	[£]	100

Source: Parties and Euromonitor.

42. The CMA asked the Parties for their shares of supply in ATC4 categories or, where relevant, for product categories according to intended use. Based on the Euromonitor market report, the Parties estimated that their combined share in each overlap category is below [5–15]%.
 43. Given that the Parties’ main customer group overlap is health food stores, the CMA also sought to estimate the Parties’ shares of supply in this segment.¹⁶

¹⁴ This is on the basis that companies supply products internally at terms and conditions not available to downstream competitors.

¹⁵ This figure excludes UK sales of juice products of £[£]. The inclusion of these sales increases Dr Organic’s share of supply to around [0–5]%.
¹⁶ NBTY and Optima sales to health food stores accounted for around [£] and [£] of their total sales respectively.

The CMA calculated, based on data from the Parties, that the Parties' combined share in this segment was about [25–35]%.¹⁷

Closeness of competition

44. Notwithstanding that the Parties' combined shares of supply are low in any segmentation, the CMA considered whether the Parties are particularly close competitors such that competition concerns may nonetheless arise.
45. The Parties submitted that quality and reputation are the key parameters of competition in the wholesale supply of VMS in the UK as products vary, for example by formulation, nutrient content, delivery form and suitability for certain customer groups (eg vegans). NBTY submitted that Solgar is considered to be a premium VMS brand and appeals to a different customer group than Optima, which is not considered to be premium.¹⁸ NBTY noted that Optima's products are typically based on simple formulations and use natural ingredients, while Solgar products are based on more complex formulations. NBTY also submitted that [REDACTED].¹⁹
46. The Parties provided details of their 20 top-selling products, which supported their submissions that they are not close alternatives as their respective products were targeted at different end uses. For example, eight out of the top 20 products for Dr Organic were [REDACTED], and another six were [REDACTED]. By comparison, only one of Solgar's top 20 products is aimed at [REDACTED] and only two are aimed at [REDACTED].
47. The CMA noted an internal document from NBTY which compares the prices of the main Solgar products against competing brands and observed that Optima's products were not included in this benchmarking exercise. This indicates that NBTY did not consider Optima to be one of its closest competitors.
48. Third parties also said that the Parties' product lines are not particularly close alternatives. One competitor said that it would expect Dr Organic customers to be loyal to its products and would be unlikely to switch to alternative brands.

¹⁷ The Parties had combined VMS sales to health food stores of around £[REDACTED] in 2014. NBTY's internal documents indicate that the health food stores segment accounts for between [REDACTED] and [REDACTED] of VMS sales in the UK. Cautiously taking the lower estimate, and using the total sales figure in Table 2, total VMS sales to health food stores would be around £[REDACTED], and the Parties' sales would be around [25–35]% of this figure.

¹⁸ NBTY said that, as an example, Optima's joint support products are focused around glucosamine complex, whilst its Solgar's joint support products have a broader set of formulations. Furthermore, in relation to comparable glucosamine complex products supplied by both Parties, the products are sold at different price points, with Solgar's products being about [REDACTED]. NBTY stated that its Solgar brand is marketed on quality, including purity and potency.

¹⁹ Whether considered across all VMS, or for individual products and product ranges.

49. On the basis of this evidence, the CMA believes that the Parties' VMS brands do not compete closely at the wholesale level.²⁰

Competitive constraints

50. The Parties submitted that there are several competing suppliers of branded VMS at the wholesale level in the UK,²¹ and several own-label products available at the retail level, such as from Tesco, Boots and Superdrug.
51. The CMA noted that NBTY's internal documents indicate that the Solgar brand operates in a competitive environment in the UK, with several other suppliers offering a constraint, eg Merck, Vitabiotics, Boots, Bayer and Health Aid.²² One internal document records that, [REDACTED].²³
52. Third parties generally told the CMA that end consumers had a number of alternatives to the Parties' products from which to choose. Two competitors suggested that their own products were close alternatives to NBTY's Solgar range, but not to the Dr Organic range due to Dr Organic occupying more of a niche place in the market. However, two competitors said that the Merger would increase Holland and Barrett's position in the retail market and could lead to an increase in prices, or a drop in product quality. In particular, one retailer was concerned that the Merger could lead to an increase in prices for Solgar and Optima products as they believed that there were few real competitors to these brands.
53. Overall, the CMA believes that the evidence above, combined with the evidence on shares of supply and closeness of competition (see paragraphs 41 to 49), indicates that there will be several competitors remaining post-Merger which will constrain the merged entity in the supply of VMS at the wholesale level.

Consideration of downstream effects on horizontal unilateral effects

54. The CMA has taken into account the effect that NBTY's presence at the retail level has on its incentives to increase prices of branded VMS at the wholesale level. This effect would arise if the Holland and Barrett Group could capture a significant proportion of diverted sales at the retail level from competing

²⁰ Or at the retail level.

²¹ Including Centrum (Pfizer); Seven Seas (Merck KGaA); Perfectil, Wellman/Wellwoman, Pregnacare (all Vitabiotics), Viridian; Nature's Plus; Quest; and others.

²² Annex 41 states that 'Competition in the UK is fierce with both pharma and niche brands competing'.

²³ Annex 16, p7 notes that [REDACTED].

retailers, in the event of a price increase of its branded VMS at the wholesale level by the merged entity.

55. NBTY told the CMA that the Holland and Barrett Group had an estimated share of VMS retail level sales of around [25–35]%,²⁴ which suggests that NBTY might capture a large share of any retail level diversion. However, third parties told the CMA that VMS branding is important to final consumers, and the CMA notes that the majority of VMS sales by the Holland and Barrett Group are of Holland and Barrett branded products.²⁵ Furthermore, third parties said that end consumers are unlikely to switch between stores in the event of a small price rise, though this could occur in the event of more substantial price changes.
56. For these reasons, the CMA believes that the effect of the Merger on the Parties' pricing incentives at the wholesale level will not be materially affected by NBTY's presence at the retail level.

Conclusion on horizontal unilateral effects

57. On the basis of the evidence set out above, the CMA believes that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the wholesale supply of VMS in the UK.

Vertical effects

58. The CMA considered whether the Merger could give rise to vertical effects through customer and/or input foreclosure.
59. In relation to customer foreclosure, the CMA considered whether the Merger could harm wholesale competition by giving the merged entity the ability and incentive to foreclose access by wholesale competitors to the Holland and Barrett Group. The CMA noted that the Holland and Barrett Group has an estimated share of VMS retail sales of around [25–35]%. However, the CMA also noted that the Holland and Barrett Group retail offering is primarily focussed on own-label VMS products (see paragraph 55), such that the ability of the merged entity to foreclose its wholesale competitors appears limited.
60. In relation to input foreclosure, the CMA considered whether the Merger could harm retail competition by giving the merged entity the ability and incentive to restrict or otherwise worsen the terms of its wholesale supply of its branded

²⁴ NBTY submitted that this was likely to be an over-estimate, since not all retailers were included in the underlying dataset.

²⁵ NBTY submitted that around [X] of VMS products sold by the Holland and Barrett Group are Holland & Barrett branded. [X] out of the 20 top-selling VMS products are Holland & Barrett branded.

VMS products to competing retailers. However, the CMA believes that, given the Parties' low combined shares of supply of VMS at the wholesale level to third parties, the limited closeness of competition between the Parties' VMS brands and the existence of several competing VMS suppliers, the merged entity would not have the ability and incentive to engage in such an input foreclosure strategy.

61. For these reasons, the CMA believes that the Merger does not give rise to a realistic prospect of an SLC as a result of vertical effects.

Third party views

62. The CMA contacted customers and competitors of the Parties. Three third parties (one retailer and two competitors) raised concerns regarding the impact of the Merger on the Holland and Barrett Group's ability to increase its dominance of the health food store market (see paragraph 52). No other third parties raised concerns about the Merger.
63. Third party comments have been taken into account where appropriate in the competitive assessment.

Decision

64. Consequently, the CMA does not believe that it is or may be the case that the Merger may be expected to result in an SLC within a market or markets in the UK.
65. The Merger will therefore **not be referred** under section 33(1) of the Act.

Andrew Wright
Director Mergers
Competition and Markets Authority
18 November 2015