

*Case No COMP/JV.54 -  
SMITH & NEPHEW /  
BEIERSDORF / JV*

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89  
MERGER PROCEDURE**

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Article 6(2) NON-OPPOSITION

Date: 30/01/2001

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EUROPEAN COMMISSION

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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(2) DECISION

To the notifying parties

Dear Sirs,

**Subject :** **Case No COMP/JV.54 – Smith & Nephew+ Beiersdorf / JV**  
Notification of 7 December 2000 pursuant to Article 4 of Council Regulation  
No 4064/89

1. On 7 December 2000, the Commission received notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89<sup>1</sup> (the “Merger Regulation”) by which Smith & Nephew and Beiersdorf intend to create a joint venture company, BSN Medical GmbH & Co KG (the “JV”). The JV will manufacture and sell traditional wound care, immobilisation, bandaging and phlebology products. On 10 January 2001, the notifying parties submitted remedies to alleviate certain competition concerns expressed by the Commission, within the deadline provided for by Article 18 (1) of Commission Regulation (EC) No 447/98 (Implementing Regulation)<sup>2</sup>.

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<sup>1</sup> OJ L 395, 30.12.89, p.1; corrected version OJ L 257 of 21.9.1990, p.13; as last amended by Regulation (EC) No 1310/97, OJ L 180, 9.7.1997, p.1, corrigendum in OJ L140, 13.2.1998, p.17

<sup>2</sup> OJ L 61, 2.3.1998, p. 1

2. After examination of the notification in its amended form, the Commission has concluded that the notified operation falls within the scope of Council (EEC) Regulation No 4064/89 and does not raise serious doubts as to its compatibility with the Common Market and the EEA Agreement.

## **I. THE PARTIES**

3. Smith & Nephew (“S&N”), which is based in London, UK, develops, manufactures and distributes medical products, including wound management, casting and bandaging products, as well as orthopaedics and endoscopy products.
4. Beiersdorf, which is based in Hamburg, Germany, develops, manufactures and distributes medical products such as wound management, casting, bandaging and phlebology products as well as cosmetics and self-adhesive tapes.
5. Both parties are in a process of restructuring, as a result of which S&N will concentrate on its advanced wound management, orthopaedics and endoscopy businesses, whereas Beiersdorf intends to focus on its branded toiletries/cosmetics, consumer and industrial adhesive tapes, as well as its consumer targeted personal healthcare businesses. Apart from the creation of the JV, which is subject to this decision, Beiersdorf recently sold its advanced wound care business to S&N, while S&N sold its consumer first aid dressings business, including the trademark Elastoplast, and the NIVEA distribution rights for the UK, to Beiersdorf.
6. As regards the sectors which will be transferred to the JV, both parties are currently active in manufacturing and marketing traditional wound care, immobilisation, bandaging and phlebology products. Some of the products which the parties sell under their trade marks are bought in from third parties. The parties’ final customers are hospitals, different types of clinics, nursing homes, doctors etc. The parties sell their products either directly to customers such as hospitals and clinics, and in some cases to doctors, pharmacies and sanitary shops, or to wholesalers. The same will apply to the JV.

## **II. THE CONCENTRATION**

7. In accordance with a Joint Venture Agreement signed on 2 November 2000, the parties will create BSN Medical GmbH & Co KG (the “JV”), in which they wish to merge their traditional wound care, immobilisation, bandaging, and phlebology businesses. The business transfer will only concern products which are aimed at professional users. Products which are aimed at consumers and which are distributed in the so-called consumer channel, in particular first aid dressings and particular types of bandages will remain within the area of activity of Beiersdorf. On the Transfer Date, which is 1 April 2001, both parties will transfer the shares in their various subsidiaries to the JV company in exchange for a 50 per cent limited partnership interest in the JV. The headquarters and the management of the JV will be based in Hamburg.

**a) Joint control**

8. According to the Joint Venture Agreement, S&N and Beiersdorf will each acquire a 50% stake in the share of the management company (the GmbH), which will be the sole general partner of the JV. Both partners will have equal voting rights and will have, therefore, joint control.

**b) Full-function joint-venture**

9. The JV will manufacture most of the products in its own manufacturing facilities or will buy them in from third parties, and will rely on products made by the parents only to a limited extent. Sales through its own sales and marketing force are expected to account for approximately [40-60%] of its total sales, while the remaining [40-60%] will be marketed through the parents' sales organisations, which will act as agents. [...] In so far as the parents act as agents, S&N will, primarily, be responsible for sales to hospitals, whereas Beiersdorf will be in charge of sales in the pharmacy channel. The JV will have its own management, which will have responsibility for the day to day operation of the JV and the implementation of the JV's strategy. The JV will have some 3000 employees. It will thus operate on a market, performing the functions normally carried out by undertakings operating on the same market.
10. The JV will be formed with a term of [more than seven] years, which shall automatically continue for successive terms of [more than two] years, unless any partner gives notice of termination for expiry [more than seven years after] the creation of the JV or a subsequent renewal date. It will, therefore, perform on a lasting basis all the functions of an autonomous economic entity.
11. The notified operation, therefore, constitutes a full function joint venture as defined by Article 3 (2) and thus, a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

**III. COMMUNITY DIMENSION**

12. In 1999 Beiersdorf achieved a worldwide turnover of €3,638 million. In the same year, S&N's turnover reached € 1,699.4 million. The combined aggregate world-wide turnover of the parties in 1999 thus exceeded €5,000 million. The combined aggregate Community-wide turnover of each of the parties was more than € 250 million [...] within the Community. Neither of the parties achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. According to Article 1(2) of the Merger Regulation, the notified operation, therefore, has a Community dimension. It does not constitute a co-operation case pursuant to Article 57 of the EEA Agreement.

## **IV. COMPETITIVE ASSESSMENT**

### **THE AFFECTED PRODUCT MARKETS IN GENERAL**

#### **1. The product markets in general**

13. The parties submit that the affected markets are (1) traditional wound care products, (2) immobilisation products, (3) bandaging products and (4) phlebology products. These product groups encompass different types of products. The proposed market definitions, on the one hand, exclude so-called advanced wound care products, and, on the other hand, branded consumer products. The proposed product markets, therefore, only include products which are aimed at professional users such as doctors and nurses.
14. The market investigation carried out by the Commission confirmed the view expressed by the parties according to which there are different markets for traditional wound care and for advanced wound care products. Although, there may be certain borderline cases, there appears to be a general consensus that there is a clear distinction based on product characteristics, price, R&D required etc.
15. The market investigation equally confirmed that there are indeed separate markets for professional users and for private consumers. Although some of the products concerned are physically identical, there are considerable differences in package size, variety of sizes, price, and sales channels. Professional products are sold either directly to major customers such as hospitals, or are bought by professionals for their own use from wholesalers, pharmacies and other retailers. Consumer products are bought by consumers in supermarkets, drug stores and in pharmacies without prescription (so-called over the counter sales) in small quantities, and are generally applied by consumers themselves to treat minor wounds or to prevent sports injuries. Furthermore, advertising and marketing techniques vary quite considerably. Respondents and the parties themselves acknowledge that there are minor overlaps between consumer and professional markets but there is a general consensus that, given their small extent, they cannot blur the fundamental distinction which exists between these different types of markets.
16. By contrast, the Commission's market investigation did not confirm the definition of the relevant product markets and of the relevant geographic market proposed by the parties. The question of the relevant product markets is discussed below in the context of the competition analysis of the markets in question.

#### **2. Market conditions**

17. In general, the markets seem to be rather conservative and stable. This applies in particular to price levels, market shares and market players. In relation to price levels, the views of suppliers and customers differ as to whether prices have actually risen or fallen in recent years. In any event, there do not seem to have been any major movements. Apart perhaps from a few specific products, there does not seem to be much scope for growth.

18. The Commission's market investigation confirmed that competitive prices are indeed the most significant factor for success in most relevant markets, with the exception of phlebology products. On the other hand, brands as well as product name, name of manufacturer and experience of practitioners with a particular product also appear to be very important. Medical practitioners appear to be hesitant when it comes to changing from products they are accustomed to. Ultimately it is doctors and nurses who influence decisions as to which products are procured without necessarily taking into account the cost aspects. A well-organised distribution and service network is considered to be of particular importance. Other important factors are a wide product range, in particular, in the bandaging and phlebology sectors, and product differentiation (except traditional wound care products).
19. In their notification, the parties claim that barriers to market entry are very low referring, in particular, to the fact that market entry would only require low investments in R&D and manufacturing equipment. If potential market entrants did not want to manufacture the relevant products themselves, sources for buying-in the relevant products would be readily available. Even though the views of competitors vary quite considerably as to how difficult it actually is to enter the relevant markets, the results of the Commission's market investigation show that market entry is not as easy as the parties claim. Regulatory approval, economies of scale, a certain product range, an efficient distribution system and establishing a reputation in the market appear to act as entry barriers, whereby market entry would appear to be easier for companies who are already active in neighbouring markets and who wish to extend their product range. Buying-in products may be an option in some cases but tends to be expensive and, therefore, not necessarily very attractive. In any event, the Commission cannot ignore that there have been hardly any movements in the markets, and that there have been very few market entrants in recent years. The Commission has no reason to believe that this situation will change in the near future.
20. In their notification, the parties refer to the high degree of buying power of their customers which would counterbalance any market power on the side of suppliers. The Commission's market investigation confirmed that some purchasers who buy in very large quantities must wield a high degree of buying power. On average, however, the buying power of customers appears to be neither particularly high nor particularly low. The parties did not demonstrate that a low number of customers or a low frequency in the allocation of supply contracts compared with the number of suppliers in the relevant markets would put suppliers under particular pressure.
21. The parties also stress the significance of tenders, which, in their view, would considerably reduce the scope for exercising market power on the supply side. It has to be emphasised, however, that market power on the supply side can be exercised also in the context of tender business. A dominant company could, for instance, practise price dumping to force smaller competitors out of the market. The fact that there are fewer competitors increases the risk of co-ordination between competitors in relation to tenders and limits the choice of customers, which may eventually lead to higher prices.
22. Moreover, the significance of tender procedures for the JV's business has to be put in perspective. Only sales to hospitals, clinics and similar customers are arranged through

tenders either by the institutions themselves or by agents. Sales to the hospital channel, however, account for less than 50% of the sales the JV can be expected to conclude, except for immobilisation products. Of the sales achieved by the parties in the hospital sector some 70% are arranged through tenders, although the extent to which tenders are used varies significantly between individual Member States. In some Member States the percentage is considerably smaller. According to these figures, tender procedures certainly do play a significant role in the markets in which the JV will be active, but their role should not be overestimated. In addition, the percentage of tenders which are advertised internationally is fairly low in some Member States. Even in so far as tenders are advertised internationally, only suppliers who are represented locally participate. According to the information available to the Commission, there is no evidence that prices are necessarily lower in countries in which tenders play a more significant role.

### **3. The relevant geographic market**

23. As regards the geographic market definition, the parties argue that the relevant markets are at least EEA-wide, with the possible exception of phlebology products. They refer, in particular, to the Medical Devices Directive (93/42/EEC), the increasing application of EEA-wide tenders, multi-lingual packaging, low transport costs and the fact that the relevant products are, to a large extent, manufactured in Member States other than the one in which they are sold, and, increasingly, outside the Community.
24. The Commission acknowledges that the different factors referred to by the parties, do indeed create a potential which, one day, could allow the markets to become EEA-wide. To date these factors have, however, proved to be insufficient for creating homogenous conditions of competition across the EEA.
25. To date most of the relevant product markets are characterised by a large number of players on the supply side, many of whom are rather small and are active in one Member State only. Some of these companies achieve quite considerable market shares in their own Member State and some of them are currently market leaders in certain product markets. In addition, there are several companies or groups of companies which are active EEA-wide or even world-wide. However, the market shares which these companies achieve in the individual Member States, show considerable discrepancies. It is not unusual for a company who is the clear market leader in one or more Member States to have extremely low market shares or not to be represented in other Member States at all. This phenomenon rather frequently occurs even among neighbouring Member States. The notifying parties themselves are a rather striking example of this phenomenon.
26. The parties admit that there are considerable differences in price levels between the Member States. On the basis of average prices achieved by the parties in the different Member States for the same products, it is clear that quite considerable differences in price levels must exist between the Member States in relation to the products in question. In some cases the prices achieved by the parties for the same product vary by more than 100%. Considerable price differences often exist even between neighbouring countries, e.g. Germany and Austria, Denmark and Sweden, France and Italy, or Spain and Portugal. The fact that there are considerable price differences is also

acknowledged by most competitors. The existence of price differences is illustrated by the following table, which is based on average prices achieved by the parties:

	<b>Leukotape , non elastic adhesive bandages, Beiersdorf , prices 2000</b>		<b>Comprilan, non adhesive support bandages, 5m x 8cm, Beiersdorf , prices 2000</b>		<b>PFA: Hansamed Bigpack, Beiersdorf , prices 2000</b>		<b>Immobilisation: synthetic casting, S&amp;N, prices 2000</b>	
	price in €	cheapest country = 100%	price in €	cheapest country = 100%	price in €	cheapest country = 100%	price in €	cheapest country = 100%
Austria	[..]	[..]	[..]	[..]	[..]	[..]	[..]	[..]
Belgium	[..]	[..]	[..]	[..]	[..]	[..]	[..]	[..]
Denmark	[..]	[..]	[..]	[..]	[..]	[..]	[..]	[..]
Finland <sup>3</sup>	[..]	[..]	[..]	[..]	[..]	[..]		
France <sup>4</sup>							[..]	[..]
Germany	[..]	[..]	[..]	[..]	[..]	[..]	[..]	[..]
Ireland <sup>3</sup>							[..]	[..]
Italy	[..]	[..]	[..]	[..]	[..]	[..]	[..]	[..]
Netherlands	[..]	[..]	[..]	[..]	[..]	[..]	[..]	[..]
Norway	[..]	[..]	[..]	[..]	[..]	[..]		
Portugal <sup>5</sup>	[..]	[..]					[..]	[..]
Spain	[..]	[..]	[..]	[..]	[..]	[..]	[..]	[..]
Sweden	[..]	[..]	[..]	[..]	[..]	[..]		
UK <sup>3</sup>							[..]	[..]

27. As regards the argument put forward by the parties and their claim that this phenomenon is a legacy of the past and that price levels tend to converge, the Commission cannot exclude that there is some degree of convergence. While several competitors expect the current differences in price levels to remain, most competitors expect price levels to converge slowly in the years to come. Nobody indicated that price levels would converge very rapidly. The information available to the Commission, therefore, does not allow it to conclude that any price convergence has reached a momentum which would change the current situation substantially in the years to come.
28. To date, tenders which are advertised internationally<sup>6</sup>, on average only play a modest role in respect of the products in question, and in some Member States their

<sup>3</sup> No information available from S&N

<sup>4</sup> No information available from Beiersdorf for these Member States

<sup>5</sup> Information not available for all products

<sup>6</sup> Only tenders of public sector contracting authorities with a value exceeding €200,000 (VAT not included) must be published in the OJ according to Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts. The



significance is particularly low (Netherlands, Finland, Ireland, Italy, Belgium, Spain). Tenders are organised only in so far as sales to hospitals or similar customers are concerned. On the basis of the information contained in the notification, the extent to which sales are arranged through tenders differs very considerably between the different Member States (on the basis of the sales achieved by the parties, the percentage of tenders varies between [1-10%] in the Netherlands, and some [85-95%] in Finland and Sweden). According to the sales figures presented by the parties they achieve only some [25-35%] of their hospital sales in the EEA through tenders which are advertised internationally. This figure drops to less than [10-20%] in many Member States (e.g. Netherlands, Belgium, Italy, Germany, Spain, Finland and Ireland). If all sales in the relevant product markets are taken into account, these figures decrease even further.

29. Even to the extent that tenders are advertised internationally, they are organised nationally, according to the Commission's investigation. Suppliers have their own sales organisation in the countries in which they operate and, in some cases, they have exclusive distributors, which also manage tenders. Only companies who have a local representation appear to participate in tenders.
30. According to the Commission's investigation, customers, including wholesalers, source the relevant products almost exclusively from within their own country. There is no evidence for a significant degree of parallel trade. Suppliers, therefore, seem to be able to control supplies to the individual Member States. Accordingly, it seems very unlikely for a substantial number of customers to purchase products in other Member States in response to a small but permanent price increase in a given Member State.
31. Despite the implementation of Directive 93/42/EEC, there are indications that national product specifications still play a certain role in relation to some relevant products, at least in the minds of practitioners. There are different traditions and habits of medical practitioners, which persist despite the fact that medical devices can circulate freely within the EEA. In the bandaging sector, for instance, market participants questioned by the Commission suggested that often different types of bandages are used in different Member States, which makes it difficult for suppliers to sell certain types of bandages in these Member States.
32. When looking at all relevant factors, the Commission concludes that the relevant product markets, for the time being, have to be considered to be national in scope and that it is unlikely that this situation will change in the near future.

#### **4. Position of the JV in general**

33. When looking at all affected markets in all EEA-countries combined, the JV will be by far the strongest player [15-20%] and will be considerably stronger than its closest competitors (Hartmann [5-10%], Lohmann & Rauscher [5-10%]). In three of the relevant product markets the combined market share of the parties is between 30% and 40% at EEA level. In these markets the closest competitor will at most have half of the

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lower threshold of the GATT Agreement on Government Procurement (SDR 130,000) does generally not apply to the customers in the relevant markets.

market share of the JV. In two product markets the combined market share is around [45-50] % at EEA level.

34. At national level, the combined market shares are in many cases above 40% and reach more than 60 or 70% or even more in some markets. In many of these cases the market share overlaps between the parties are small [..]. This is due to the fact that S&N is in general very weak in countries such as Germany and the Netherlands, whereas Beiersdorf is very weak in the UK, Ireland and France. Nevertheless, the parties often have very high market shares in neighbouring geographic markets and, through the JV, are combining their geographic strengths.
35. The JV will have the financial support of its parents, whose combined world-wide turnover amounts to €5.3 billion as compared to [more than €800 million] million for Hartmann AG and [less than €300 million] for Lohmann & Rauscher. Companies like Johnson & Johnson and 3M, which are more powerful financially, may be strong in specific markets but, compared with the parties, have much lower market shares in the affected markets within the EEA in general. The overall broader presence of the JV in terms of product range and geographic scope, the increased financial power, the efficiency gains and advantages in the cost structure brought about by the concentration will strengthen the parties beyond the mere aggregation of market shares. The parties have a very good reputation in the markets, which is based inter alia on the quality of their products, their brands, their customer contacts and sales forces. These factors, combined with the efficiency gains and improvements in the cost structure which can be expected from the formation of the JV, will put the JV in a very strong competitive position.
36. Furthermore, there will be one significant player less who would be one of the most likely candidates for expanding its presence in certain markets. If the parties had wanted to expand, in the absence of the JV, S&N would have had to increase its efforts to strengthen its position, for instance, in Germany or the Netherlands, while Beiersdorf would have had to strengthen its position in particular in the UK. The fact that, for instance, S&N is active in Germany and the Netherlands despite very low market shares in most relevant product markets shows that these markets were considered to be sufficiently attractive and would have been natural candidates for expansion by S&N. The same applies to Beiersdorf in the UK.
37. For these reasons, it is held that the JV will change the structure of competition even in some markets where the overlaps between the parties are currently very small, which is why even markets in which there is only a very small increment in market shares have to be examined critically.

## **THE INDIVIDUAL MARKETS**

### **A) TRADITIONAL WOUND CARE PRODUCTS**

#### **1. Product Market Definition**

38. Under the heading “traditional wound care products” the parties have grouped together so-called surgical dressings and so-called first aid dressings (“FAD”s). The term “surgical dressings” is a widely used term for a range of most textile-based wound care products, consisting primarily of swabs, cotton wool, dressing pads, sterile dressing pads etc. Surgical dressings are used for swabbing and cleaning wounds and absorbing exudate (wound fluid). Secured with a fixation product some surgical dressings can also be used to cover a wound. According to the parties, swabs and first aid dressings can be used interchangeably dependant on clinical preference and other factors such as cost, convenience, availability etc. For instance, a puncture site caused by a blood sample could be covered either by a first aid dressing or a surgical dressing.
39. There are, however, some significant differences between surgical dressings and FADs. Surgical dressings are used in hospitals for operations and wound management in general, whereas FADs, as indicated by the name, are predominantly used for first aid purposes. The scope of application of FADs in hospitals appears to be fairly limited. Surgical dressings in general have to be sterile, which is not necessarily the case for FADs. Given their function of absorbing exudate, surgical dressings are usually bigger and thicker than FADs, which makes them less suitable as a wound cover for smaller wounds, for instance, on a finger. Even in so far as a surgical dressing could replace a FAD as a wound covering device, it cannot perform this function on its own but requires a fixation product to fix it to the patient’s body. FADs, moreover, do not seem to be an alternative to surgical dressings as regards swabbing and cleaning wounds.
40. Most market participants consider that surgical dressings and FADs cannot be considered to be part of the same product market.
41. In light of the above, the Commission takes the view that FADs and surgical dressings form separate product markets.

#### **2. Competition analysis**

##### **2.1. Surgical Dressings**

42. The combined market shares of the parties with regard to surgical dressings do not give rise to competition concerns at EEA level nor at the level of the individual Member States. At EEA level the combined market share of the parties is only [1-5%]. The combined market share is above 20% only in Denmark [30-35%], the Netherlands [25-30%], Ireland [20-25%] and the UK [20-25%]. Based on current market share figures, the JV would not become the market leader in any of these Member States.

## 2.2. Professional First Aid Dressings

43. Since it has been established that consumer FADs form a separate market and will be outside the scope of the JV, the competitive situation has to be considered in relation to professional first aid dressings only. At EEA level the parties' combined market share is [30-35%] in an otherwise split market, whereas the strongest competitor achieves 10%, which will give the JV a very strong position. Currently Beiersdorf is the market leader at EEA level [15-20%], while S&N [10-15%] is the strongest competitor. In the neighbouring market of consumer FADs, Beiersdorf is the undisputed market leader within the EEA and enjoys very high market shares in most European countries. Following the acquisition of the Elastoplast brand from S&N, it will also achieve high market shares in the UK and Ireland.
44. With regard to professional FADs the JV will have market shares of more than 30% in eight Member States: In Finland, the JV will, however, only be the second strongest competitor, and in Austria, Belgium and the UK the position of competitors seems to ensure that the JV will not be dominant: In Austria, the combined market share is [30-35%], with the strongest competitors reaching [25 -30%], [15-20%] and [15-20%] respectively, in Belgium, where the combined market share is [45-50%], competitors hold [25-30%] and [5-10%], and in the UK the parties combined market share is [30-35%] as opposed to [15-20%], [15-20%] and [15-20%] for their strongest competitors. In Greece and Ireland, the combined market shares of the parties reach [85-90%] and [55-60%] respectively, but there is no aggregation of market shares, considering that S&N is not active in Greece and Beiersdorf is not active in Ireland.
45. In the Netherlands, Beiersdorf already holds a market share of [65-70%]. There is one competitor with [5-10%] (Medeco, a competitor who is nearly exclusively active in the Netherlands), and there are four competitors with about 5% or less, including Smith & Nephew. In the absence of a strong competitor, the increase of the market share to [70-75%] along with the disappearance of one competitor is bound to weaken competition in this market further. Moreover, the Netherlands is a market in which tenders only play a minor role.
46. In Germany, the combined market share is [55-60%], of which S&N contributes [1-5%]. The two biggest competitors have market shares of around only 10% each. It is generally acknowledged that Germany is a high price market. Considering, in addition, that currently S&N is the second largest supplier of professional first aid dressings at EEA level after Beiersdorf and taking account of the arguments discussed above, it has to be considered that competition will be weakened further in Germany as well.
47. In light of the above, it can be concluded that the proposed concentration raises serious doubts as to its compatibility with the common market in relation to professional first aid dressings in the Netherlands and in Germany.

## **B) IMMOBILISATION PRODUCTS**

### **1. Product market definition**

48. As regards immobilisation products, the notifying parties claim that plaster of Paris casts, synthetic casts, splints, undercast padding and casting accessories all form part of a market for immobilisation products. The common function of plaster of Paris, synthetic casts and splints is the passive healing of a fractured limb through immobilisation.
49. Plaster of Paris is the original casting bandage and consists of cotton-gauze cloth impregnated with powder (Gypsum), which is dipped in water and then wrapped around the limb to be set post-fracture. According to the notification, synthetic casts perform exactly the same function as plaster of Paris casts and are applied in the same way but are made of more modern materials, normally glass fibre. Synthetic casts are typically 2 or 3 times as expensive as plaster of Paris. The parties claim, however, that synthetic casts can be just as economical despite the higher purchasing price as they can be applied more quickly, last longer and do not need to be removed to take x-rays.
50. The majority of customers questioned in the Commission's market investigation, however, indicated that, in their view, plaster of Paris and synthetic casts form separate product markets. Given the different characteristics of the two products, e.g. synthetic casts are much lighter, water resistant and do not have to be replaced as frequently as plaster of Paris casts, it appears that the use of either plaster of Paris or synthetic casts depends primarily on the circumstances of the specific case, including aspects such as the type of injury and the age of the patient. Considering in addition the big difference in price between both types of casts, it is very unlikely that customers would switch from plaster of Paris to synthetic casts and vice versa as a response to a small but permanent price increase in relation to one these products. The Commission, therefore, concludes that plaster of Paris and synthetic casts form separate product markets.
51. According to the notification, splints are pre-formed casts and can be either based on plaster of Paris or synthetic materials. They are often attached to the human body by using bandages and do not require any undercast padding. Some splints come with a zip. They can be taken off the patient's body for a period of time and can be used again for the same patient. Splints are more expensive than synthetic casts. Given that they are easier to apply, to remove and to re-apply, they are very suitable for treatment which requires periods of mobility or for fresh fractures in the acute phase. When looking at the price, the way in which they are applied and the circumstances in which splints are used, splints have to be considered as a product market in its own right. This view is confirmed by the Commission's market investigation.
52. Undercast padding and immobilisation accessories such as cast shoes or tools for the cast room are used in the context of treating injuries by way of immobilisation, but they obviously do not perform any immobilisation function themselves and are, therefore, not interchangeable with immobilisation products as such, i. e. plaster of Paris, synthetic casts and splints. Furthermore, most customers indicated that they buy the

relevant products from different sources. Accordingly, the Commission concludes that undercast padding and casting accessories are part of distinct product markets.

53. In the light of the above, the Commission concludes that plaster of Paris, synthetic casts, splints, undercast padding and casting accessories form separate product markets.

## **2. Competition analysis**

### **2.1. Splints**

54. At EEA level, Beiersdorf will add [5-10%] to the [40-45%] market share achieved by S&N, compared with about 25% for both 3M and Lohmann & Rauscher. Johnson & Johnson and some national suppliers only have very small market shares at EEA level. Splints are a very small product market, which, however, seems to be expanding. Due to its small size there have been some fluctuations in market shares, which are untypical for the sector at large. Almost two-thirds of the EEA-wide turnover is achieved in Germany.
55. Due to S&N's strength in this product market the JV can be expected to have market shares of more than 40% in nine Member States. In some cases they are even above 50 and 60%. In most Member States 3M and Lohmann & Rauscher, however, have market shares between 20% and 30%. Due to the fact that Beiersdorf is active exclusively in Germany, Germany is the only market where there is an overlap between the parties, which results in a combined market share of [45-50%] ([40-45%+5-10%]). Given that Lohmann & Rauscher and 3M have market shares of [25-30%] and [15-20%] respectively in this Member State, it cannot be concluded that the JV will create or strengthen a dominant position. Considering that Germany is by far the biggest market within the EEA [and] that Beiersdorf's market share is low [..], it does not seem very likely that Beiersdorf would have extended its activities with regard to splints to other Member States.
56. Accordingly, it can be concluded that the proposed concentration will not lead to the creation or strengthening of a dominant position in relation to splints in any of the Member States.

### **2.2. Synthetic casts**

57. As regards synthetic casts the parties have a combined market share of [15-20%] EEA-wide as opposed to [45-50%] for 3M and around 15% for Lohmann & Rauscher and Johnson & Johnson. National suppliers have only very small market shares. The JV would have market shares between 20% and 30% in six Member States, but would not be the market leader. Beiersdorf is not represented at all in most of the Member States and has substantial market shares only in Germany [10-15%] and Spain [5-10%]. Accordingly, the JV will not lead to the creation or strengthening of a dominant position in any of these markets.

### **2.3. Plaster of Paris**

58. In relation to plaster of Paris the parties have a combined market share of [45-50%] ([35-40%+10-15%]). Lohmann & Rauscher, the strongest competitor, has about 25%

market share followed by Hartmann with [5-10%]. National competitors only have very small market shares at EEA level.

59. At national level, the JV would achieve market shares of more than 40% in seven Member States with regard to plaster of Paris: [50-55%] in Belgium, [70-75%] in France, [85-90%] in Spain, [55-60%] in Sweden and [80-85%] in the UK. Due to the fact that Beiersdorf is active only in Germany and Spain and that S&N is not represented on the German market so far, the formation of the JV would lead to an increase in market share only in Spain by adding Beiersdorf's [35-40%] to the S&N's [45-50%]. The national plaster of Paris markets are very small in terms of value, which is why it cannot be assumed that Beiersdorf would have had a natural interest to move into other national markets.
60. In light of the above, it can be concluded that the proposed concentration raises serious doubts as to its compatibility with the common market in relation to the market for plaster of Paris in Spain.

#### **2.4. Undercast padding**

61. At EEA level the JV will have a market share of [20-25%] ([10-15%+5-10%]), which is comparable to that of Lohmann & Rauscher ([..]). In individual Member States, the parties have combined market shares of more than 30% only in Greece [30-35%], Sweden [30-35%] and the UK [30-35%]. Considering also the position of competitors, these market shares do not give rise to competition concerns.

#### **2.5. Casting accessories**

62. In relation to cast shoes, which both parties buy in from third party manufacturers, the combined market share of the parties is [15-20%] ([10-15%+1-5%]) at EEA level. In Austria, where the combined market share is [45-50%], only Beiersdorf is active so far, and there is a competitor with 30% market share. In Belgium, where the combined market share is [45-50%] ([20-25%+25-30%]), Lohmann & Rauscher holds a market share of [30-35%]. In these circumstances, it cannot be expected that the formation of the JV will lead to the creation or the strengthening of a dominant position with regard to cast shoes. As regards other casting accessories, there will be no aggregation of market shares since Beiersdorf does not supply any of these products.

### **C. BANDAGING PRODUCTS**

#### **1. Product Market Definition**

63. According to the notification, there is one product market for bandaging products, comprising support bandages, fixation bandages and orthopaedic soft goods. The group of support bandages includes elastic adhesive bandages, non-elastic adhesive bandages and non-adhesive support bandages. These bandages provide different degrees of support for muscles or limbs either prophylactically or post-trauma. Elastic adhesive bandages and non-adhesive support bandages are also used for compression purposes. As regards fixation bandages there are adhesive and non-adhesive fixation bandages. All fixation bandages perform the same basic function of fixing wound pads to the

patient's skin, or fixing and securing instruments, tubes, catheters etc. to the patient's skin. Orthopaedic soft goods perform the function of ready-to-use support bandages and are designed for use in specific situations such as support for the cervical vertebral column, support and fixation of the arm in shoulder injuries, and support and fixation of knee, ankle and elbow injuries. In contrast to simple bandages these special bandages are easier to apply, convenient to wear and ensure a secure fit throughout the therapy. According to the notification there are overlaps between these three types of bandages, as orthopaedic soft goods are often used as a substitute for support bandages and fixation bandages by providing support for specific joints. Fixation bandages could also be used to provide light support and both types of bandages could be used to fix casting products to the body.

64. According to the market survey carried out by the Commission, market participants are, however, of the view that the three groups of bandages form separate markets. Respondents almost unanimously held that orthopaedic soft goods constitute a market in its own right. An overwhelming majority of respondents supported the view that support bandages and fixation bandages belong to separate product markets. Orthopaedic soft goods seem to be far more advanced and far more expensive and in their application a far more specific product compared with normal support bandages. Moreover, orthopaedic soft goods can, where necessary, be removed and re-applied by non-professionals. Despite the fact that in many situations they may substitute support bandages, they must, for these reasons, be considered as a separate market. As regards the relation between support bandages and fixation bandages, any overlaps do not appear to be significant enough to consider them as forming part of the same product market. The basic function they perform is clearly defined: support and compression, on the one hand, and fixation, on the other hand. The parties do not argue, for instance, that fixation bandages could be used to provide moderate or strong support or compression. As a consequence, it does not seem justified to consider support bandages and fixation bandages as one product market.
65. Some market participants even suggested narrower product markets within the bandaging sector. Given that the overwhelming majority of market participants is of the view that a further sub-division is not meaningful and that the distinction between support bandages and fixation bandages is the most appropriate distinction, and considering the functions which support and fixation bandages perform, the Commission found no reason to pursue the question of sub-divisions any further.
66. As a consequence, the Commission concludes that fixation bandages, support bandages and orthopaedic soft goods form separate product markets.
67. In their notification the parties argue that the multi-layer bandaging system which is marketed by S&N under the trademark Profore, and will continue to be marketed by S&N after the formation of the JV, should not be considered as part of any bandaging market due to its advanced character. According to the majority of third parties, the Profore system is, basically, a combination of bandages which is sold as a package and which can be replaced by other bandages which are on the market, and should therefore not be considered as belonging to a separate market. It sells mainly in the UK and Ireland, whereas in other Member States there are alternative bandaging solutions for



the same problem. Accordingly, the Profore system forms part of the market for support bandages.

## **2. Competition analysis**

### **2.1. Fixation bandages**

68. At EEA level, the parents' combined market share is [30-35%], to which Beiersdorf contributes [20-25%] and S&N contributes [5-10%]. The next two competitors, 3M and Hartmann hold around 15% each. In seven Member States the combined market share of the parties is close to or above 30%: Austria [25-30%], Belgium [25-30%], Denmark [30-35%], Finland [25-30%], Italy [30-35%], Germany [55-60%] and the Netherlands [50-55%]. Given the relative strength of competitors in the first five countries ([30-35%] and [20-25%] in Austria; [15-20%], [15-20%] and [15-20%] in Belgium; [15-20%] and [10-15%] in Denmark; [20-25%], [15-20%] and [10-15%] in Finland and [15-20%], [10-15%] and [10-15%] in Italy) there are no grounds for competition concerns in these countries.
69. In Germany, the JV will have a market share of more than 55% as opposed to two competitors with approximately 15% market share each. In the Netherlands, the JV would start with a market share of [50-55%]. The strongest competitor (Medeco), who is a company which is almost exclusively active in the Netherlands, reaches [20-25%] and the third largest competitor achieves [10-15%]. In both cases S&N will add [1-5%] to the already very high market share held by Beiersdorf in these markets. In Germany, the JV will be nearly twice as strong as its closest competitors taken together. In the Netherlands the JV will be more than twice as strong as its closest competitor and clearly stronger than the two closest competitors taken together. The markets are very stable in both countries. Germany is known to be a high price market. In the Netherlands tender procedures only play a marginal role.
70. In light of the above, it can be concluded that the proposed concentration raises serious doubts as to its compatibility with the common market in relation to fixation bandages in Germany and in the Netherlands.

### **2.2. Support bandages**

71. At EEA level, the parties have a combined market share of [35-40%] ([20-25%+10-15%]). The two biggest competitors at EEA level, Lohmann & Rauscher and Hartmann have just under 15% each. Other competitors, of whom many are active only in one or a few Member State(s), have only very small market shares at EEA level.
72. The JV will have market shares of 30% or more in nine Member States. In France, where the combined market share is [30-35%], the JV will face strong competition by Hartmann and Thuasne, who have market shares of [25-30%] and [15-20%] respectively. In Germany, where the combined market share is [30-35%], there is strong competition from Lohman & Rauscher and Hartmann, who have market shares of [20-25%] and [15-20%] respectively. In the Netherlands the combined market share is [35-40%] ([30-35%+5-10%]). The JV will, however, face strong competition from

Lohmann & Rauscher and Medeco, who have market shares of [25-30%] and [10-15%] respectively.

73. In Ireland, the combined market share will be [60-65%], and competitors appear to have only very small market shares. Considering that the increment caused by Beiersdorf is [minor], that Beiersdorf does not have its own sales force in Ireland and that, finally, the Irish market for support bandages is very small, it may be questionable whether the JV will give rise to competition concerns.
74. In Belgium, Denmark, Italy and Spain, the formation of the JV will lead to market shares of [40-45%] or more, with the increment in market shares being at least [5-10%]. Considering the position of competitors, it can be expected that competition will be weakened significantly as a consequence of the formation of the JV in all four markets. In Belgium the combined market share is [55-60%] ([25-30%+25-30%]) compared with [15-20%] for Lohmann & Rauscher and [15-20%] for Hartmann. In Denmark, the combined market share is [50-55%] ([35-40%+10-15%]) compared with [15-20%] for Lohmann & Rauscher, while there are several small competitors with around 5%. In Italy, the JV will start out with a market share of [40-45%] ([35-40%+5-10%]) as opposed to [15-20%] for Lohmann & Rauscher. Several small competitors have between 1% and 8%. In Spain, the combined market share is [45-50%] ([35-40%+5-10%]). The main competitors are Farmaban and Torval, two small companies who seem to operate only in Spain and who have market shares of [15-20%] and [10-15%] respectively. In Belgium, Italy and Spain, EEA-wide tenders only play a minor role. According to the information contained in the notification, it seems that only some [5-15%] of hospital purchases in these countries are arranged through EEA-wide tenders. In Denmark, it is unlikely that more than [20-30%] of sales in support bandages are arranged through tender procedures.
75. In the UK, S&N currently has a market share of [45-50%] in relation to support bandages, to which Beiersdorf will add [1-5%]. Considering the size of the UK market compared with most other geographical markets in the EEA, and Beiersdorf's strong position elsewhere in the EEA, this market would appear to have been one of the major targets for expansion by Beiersdorf. S&N's main competitors in the UK are SSL and Millpledge, which achieve market shares of [20-25%] and [5-10%] respectively.
76. In light of the above, it can be concluded that the proposed concentration raises serious doubts as to its compatibility with the common market in relation to support bandages in Belgium, Denmark, Italy, Spain and the UK.

#### **4. Orthopaedic soft goods**

77. At EEA level the combined market share of the parties is [10-15%] (Beiersdorf [10-15%], S&N [1-5%]). This market share will make the JV the second largest competitor after Bauerfeind, whose market share is estimated at [20-25%]. In Ireland, Beiersdorf will add nothing to the [35-40%] held by S&N and there is a competitor which is almost as strong (DJ Orthopaedics [35-40%]). In Finland, Beiersdorf's market share in 1999 was [85-90%]. There is, however, no overlap and the market is extremely small (€ 9,000), which is why market share figures may fluctuate easily. Given S&N's weak

position in this product market it is unlikely that S&N would have moved into the Finnish market.

78. In light of the above, it appears that the formation of the JV will not lead to the creation or strengthening of a dominant position in any of the markets for orthopaedic soft goods.

#### **D) PHLEBOLOGY PRODUCTS**

79. Phlebology deals with problems relating to venous and lymphatic systems including aching and swollen legs, varicose veins and chronic leg ulcers. In this field the Joint Venture will be active in manufacturing and supplying medical hosiery, and in particular, compression, support and anti-embolism hosiery.
80. At EEA level the parties have a combined market share of [5-10%] (Beiersdorf [5-10%], S&N [1-5%]) as regards phlebology products in general. In relation to compression stockings the market share is [5-10%] (Beiersdorf [5-10%], S&N [1-5%]), in respect of anti-embolism stockings [15-20%] (Beiersdorf [15-20%], S&N [1-5%]) and in relation to support stockings it is only [1-5%].
81. In the individual Member States the combined market share of the parties is above 30% in relation to compression stockings in Denmark [35-40%] and in relation to anti-embolism stockings in Austria [30-35%], Belgium [30-35%], Germany ([35-40%]: [30-35%+5-10%]), the Netherlands [30-35%] and Sweden [35-40%]. In all of these markets apart from Germany, there are no overlaps. Furthermore, in Austria, Belgium, Denmark and the Netherlands there appear to be competitors with higher market shares. As regards anti-embolism stockings in Germany, there are two competitors, Tyco-Kendall and Medi, with about [25-30%] each.
82. Since it can be excluded that the operation will lead to the creation or the strengthening of a dominant position, irrespective of possible product market definitions in this area, the question of the most accurate market definition can be left open in the area of phlebology products.

#### **E) NON-AFFECTED MARKETS**

83. Apart from the product markets referred to above, the JV will be active in the supply of certain other medical products in relation to which there are, however, no overlaps between the parties and where, accordingly, the creation of the JV will not give rise to competition concerns.

#### **F) SUMMARY**

84. As a consequence of what has been said above, the formation of the JV gives rise to serious competition concerns in the following markets:

PRODUCT MARKET	GEOGRAPHIC MARKET
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Professional FADs	Germany and Netherlands
Fixation bandages	Germany and Netherlands
Support bandages	Belgium, Denmark, Italy, Spain and UK
Plaster of Paris	Spain

## V. COOPERATIVE EFFECTS

85. According to the Commission's market investigation, a clear distinction has to be made between the markets in the "advanced wound care" area, on the one hand, and those in the field of traditional wound care, on the other hand. At the same time, there is a clear distinction between the so-called professional market(s), on the one hand, and the so-called consumer market(s), on the other hand. As a consequence, the two parent companies will not be active in the same markets once the restructuring has been completed.
86. In so far as Beiersdorf will continue to sell FADs, bandages and orthopaedic soft goods, these sales will be targeted exclusively at consumer channels, whereas the JV will sell such types of products exclusively to the medical professional channels. S&N, by focussing on advanced wound management products, will leave the product markets in which the JV will be active almost entirely. Even in so far as there may be small overlaps between the JV and S&N, due to the fact that some of its products could not be qualified as advanced wound care products, S&N will not target these products at consumers. Even in so far as the parents act as agents for the JV, their areas of responsibility are clearly separated according to sales channels and, in some cases, countries. Moreover, the parties will not be active in the same neighbouring markets.
87. The only common interest of the parties in the relevant markets, therefore, lies in their joint participation in the JV. As a result of the specialisation of the parties, the risk of co-ordination of competitive behaviour between the parent companies as a consequence of the creation of the JV would appear to be very small, which is why it can be concluded that the JV does not have as its object or effect the co-ordination of the competitive behaviour of the parent companies (Article 2 (4) of Regulation 4064/89).

## VI. ANCILLARY RESTRICTIONS

88. The parties notified a non-compete clause as an ancillary restriction:  
Under clause 14 of the Joint Venture Agreement, both S&N and Beiersdorf agree not to compete with the JV (until they cease to be a partner in the JV, or) for a [fixed] period [of more than one year ] from the transfer date. Likewise, the JV will be restricted for [a fixed period of more than one year ]from competing with S&N's advanced wound management business or from promoting or selling any products using a consumer methodology. The parties argue that these restrictions are directly related and necessary for the implementation of the concentration. Neither JV partner would invest in the JV if it knew the other partner would seek to sell products competing with the JV. The partners would, moreover, expect that for the first three years of the JV, the JV will not seek to compete with their core business areas, on which they would focus their activities until being able to diversify into other product ranges.

89. The Commission considers that these restrictions are directly related to and necessary for the implementation of the concentration.

## **VII. UNDERTAKINGS SUBMITTED BY THE PARTIES**

90. In order to remove the concerns raised by the operation, the parties have submitted a number of undertakings, which will be described and analysed below. The parties submitted commitments on 10 January 2001, i. e. within the deadline provided for by Article 18 (1) of Commission Regulation 447/98. On 17 January 2001, following a market test and as an immediate response to the comments made by the Commission's services, the parties presented improvements to ensure that the commitments are workable and effective. The full text of the consolidated version of the commitments is provided in Annex 1, which forms an integral part of this decision.
91. The parties commit to divest various businesses which give rise to an aggregation of market shares in the markets identified above and which will decrease the overall strength of the JV across the EEA. The commitments will enable the purchasers previously approved by the Commission to be viable competitors and to compete with the JV in those markets where effective competition would otherwise be threatened as a result of the creation of the JV. The fact that several competitors have shown an interest in the businesses to be divested demonstrates their viability.

### **1. Professional First Aid Dressings**

92. The parties undertake to divest S&N's Airstrip business throughout the EEA with the exception of the UK, where the business will be retained by the JV. The divestment includes the assignment of the Airstrip trade mark. The purchaser will be required to grant royalty-free perpetual licences in relation to the Airstrip trade mark in the UK for the JV and throughout the EEA to S&N as regards advanced wound care products. The parties will also divest the Primapore business throughout the EEA, including the assignment of the Primapore trade mark, but require a royalty-free perpetual trade mark licence back to S&N in relation to advanced wound care products throughout the EEA. The parties also undertake to divest the remainder of S&N's FADs businesses in Germany and the Netherlands, including royalty-free perpetual licences in relation to the Cicaplaie and Tenso trade marks in Germany and the Tenso trade mark in the Netherlands.
93. In addition to the relevant trade mark rights or licences, the sale of the business will include the following: goodwill; details of customer contacts; current price lists and actual pricing information; an assignment to the purchaser of all existing commercial agreements with customers and suppliers; all technical know how, all other intellectual property rights and all other confidential and non-confidential information relating to the business; all stocks of raw materials and finished products as at completion of sale; and to the extent requested by the purchaser, employees whose services are necessary for the sales and marketing of the transferred business. In addition, the parties undertake that, upon the purchaser's request, they will supply semi-processed materials at cost and make available any manufacturing equipment they may require.

94. These commitments will entirely eliminate the aggregation of market shares in Germany [1-5%] and in the Netherlands [5-10%]. At EEA level, the total divested business will reduce the combined market share of the parties by around [1-5%]. It will also eliminate increments in many Member States other than Germany and the Netherlands.
95. In light of the above, it can be concluded that, subject to compliance with the undertakings submitted by the parties, the operation will not create or strengthen a dominant position in the markets for professional first aid dressings.

## **2. Fixation bandages**

96. The parties undertake to divest the S&N Albu range of products across the EEA, with the exception of France. The divestment includes the assignment of the Albu family of trade marks throughout the EEA. The purchaser will, however, be required to grant a royalty-free perpetual trade mark licence of the Albu brands in France back to the JV. The parties also undertake to divest the business carried on under the Hypafix and Easifix brands in Germany, the Netherlands and Austria. In addition, in the Netherlands the parties will divest the Sleek brand and S&N's business of distributing third party products. The purchaser will be granted royalty-free perpetual licences with regard to these trademarks in the relevant Member States.
97. In addition to the relevant trade mark rights and licences, the items listed under paragraph 93 above, will in each case be included, except in relation to the Easifix brand where instead of supplying semi-processed materials to the purchaser, the parties would, if requested, supply finished products at cost.
98. The undertakings offered by the parties would have the effect of eliminating any aggregation of market share in Germany and the Netherlands. As regards the EEA as a whole, the proposed divestment corresponds to a market share of [1-5%].
99. In light of the above, it can be concluded that, subject to compliance with the undertakings submitted by the parties, the operation will not create or strengthen a dominant position in the markets for fixation bandages.

## **3. Support bandages**

100. The parties agree to divest a number of support bandage businesses. Firstly, Beiersdorf's EEA Uniflex crepe bandage business (excluding Germany) will be sold, including the rights to the Uniflex trade mark throughout the EEA. However, in Germany the purchaser would be required to grant a royalty-free perpetual trade mark licence back to the JV. Secondly, the parties would sell S&N's EEA crepe bandage business (excluding the UK), as well as the Elastocrepe and Tensocrepe trade marks throughout the EEA. The purchaser would be required to grant the JV a royalty-free perpetual trade mark licence in relation to these brands in the UK. Thirdly, the parties would divest S&N's support bandage business in Denmark: currently, S&N distributes the Tubigrip brand on behalf of SSL in Denmark. S&N would terminate this arrangement thereby allowing SSL to appoint a new distributor (alternatively SSL might choose to distribute the product itself).

101. In addition, the parties agree to divest Beiersdorf's support bandage business in Belgium and grant a royalty-free perpetual licence in relation to the Elodur and Elastoplast trade marks in that Member State. The parties also agree to divest the business carried on under the Idealbinde name in Denmark. In Italy the parties agree to divest the Extensoplast and Elodur businesses and grant trade mark licences, as well as divest S&N's tubular bandage business sold under the Tensogrip trade mark. In the UK, the parties have offered to divest S&N's private label business by procuring the novation of existing contracts with wholesalers and agreeing not to compete with the divested business for a [fixed] period []. *Idealbinde* is not a registered trade mark but the parties agree not to use the name in Denmark on support bandage products for a period of [more than one year] from the sale of the business. The divestments referred to in this and the previous paragraph include all items listed in paragraph 93 above (except semi-processed materials and manufacturing equipment).
102. In Belgium, the commitments offered would reduce the increment brought about by the JV to [5-10%] and would reduce its market share from [55-60%] to [35-40%]. In Denmark, the commitment offered would lead to a reduction in market share which is larger than the increment caused by the JV and which would reduce the combined market share of the parties to [30-35%]. In Italy the commitments offered will bring the increment in market share down from [5-10%] to [1-5%]. This would result in a combined market share of [35-40%]. In Spain the commitments offered will reduce the combined market share by around [10-15%], which is more than the [5-15%] increment created by the operation, and will result in a combined market share of approximately [35-40%]. In the UK, the commitment offered would eliminate the [1-5%] increase brought about by the JV.
103. The majority of the products referred to above are bought in from third parties, and, accordingly, there are no manufacturing facilities to be divested in relation to these businesses. Given these circumstances and considering the lack of any negative statements from the markets in this respect, a lack of manufacturing capacity does not seem to prejudice against a company's ability to supply these products and to compete effectively in the support bandage market. As regards the EEA as a whole, the divested business will reduce the combined market share of the parties by [1-5%] to [35-40%].
104. In Ireland the commitments offered will reduce the parties' market share by [10-15%], which is considerably higher than the increment brought about by the operation, which means that any potential concern would be removed also in Ireland.
105. In light of the above, it can be concluded that, subject to compliance with the undertakings submitted by the parties, the operation will not create or strengthen a dominant position in the markets for fixation bandages.

#### **4. Plaster of Paris**

106. The parties have offered to divest Beiersdorf's plaster of Paris business in Spain, including the items referred to in paragraph 93 above (excluding semi-processed material), to grant a royalty-free perpetual licence of the Platrix and Biplatrix trade

marks in Spain and to grant an option to purchase Beiersdorf's plaster of Paris manufacturing equipment.

107. The parties' commitment would have the effect of reducing the JV's market share in Spain by [35-40%], thus eliminating any aggregation of market share as regards Plaster of Paris.
108. In light of the above, it can be concluded that, subject to compliance with the undertakings submitted by the parties, the operation will not create or strengthen a dominant position in any of the possible product markets for immobilisation products in Spain.

## **VIII. CONCLUSION**

109. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the Common Market and the EEA Agreement subject to the condition of full compliance with the undertakings set out in Annex 1 to this decision. This decision is adopted in application of Article 6(2) of Council Regulation (EEC) No 4064/89.

For the Commission,  
Mario Monti  
Member of the Commission



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**CASE NO.JV/54 - SMITH & NEPHEW/BEIERSDORF**

**COMMITMENT**

**1. Introduction**

- 1.1 Pursuant to Article 6(2) of Council Regulation (EEC) No. 4064/89 (as amended) (the "Regulation"), Smith & Nephew plc ("S&N") and Beiersdorf AG ("Beiersdorf") hereby give the commitment set out below (the "Commitment") to the Commission of the European Communities (the "Commission") in respect of the creation of BSN Medical GmbH & Co KG (the "Joint Venture"). The commitment shall take effect on receipt of the Commission's decision declaring the concentration compatible with the common market pursuant to Article 6(2) of the Regulation (the "Decision"). The Commitment which is described fully below, includes the divestment of a number of the parties' businesses in the professional first aid dressings ("FADs"), fixation bandages, support bandages and plaster of Paris product areas, thereby removing all aggregation in market share (or reducing the market share of the Joint Venture to below 40 per cent) in the specific markets identified by the Commission as giving rise to concerns, and reducing the Joint Venture's market share across the EEA.

**2. Commitments relating to the relevant businesses**

- 2.1 The relevant businesses are set out in summary form in Appendices 1 and 2. A detailed description is set out below.

***Professional FADs***

- 2.2 The parties undertake to divest the S&N *Airstrip* and *Primapore* businesses throughout the EEA (with the exception of *Airstrip* in the UK). They also undertake to divest the remainder of S&N's FADs businesses in Germany and the Netherlands, specifically:

- (a) in Germany, the business carried on under the *Cicaplaie* and *Tenso* brand names; and
- (b) in the Netherlands, the business carried on under the *Tenso* brand names.

- 2.3 In each case, the business to be divested will include:

- (a) goodwill;
- (b) details of customer contacts;
- (c) current price lists and actual pricing information;

- (d) an assignment to the purchaser of all existing commercial agreements with customers and suppliers and all agreements entered into between the date of the Commitment and the closing of the sale of the Divestments;
- (e) technical know how, all other intellectual property rights, and all other confidential and non-confidential information existing in relation to the products to be divested (see below for details as to trade mark rights);
- (f) all stocks of raw materials and finished products as at completion of the sale;
- (g) to the extent permitted by law or contract, and to the extent requested by the purchaser, either on a temporary or permanent basis, employees of the parties whose services are necessary for the sales and marketing of the transferred businesses. If the purchaser so requests, the parties undertake to negotiate in good faith putting the said personnel at the disposal of the purchaser on a temporary basis or transferring them to the purchaser indefinitely. The parties also agree not to hire or solicit such transferred personnel for a period of two years from the date of the sale of the assets.

2.4 In relation to the trade marks set out in 2.2 above, the parties will assign S&N's ownership of the *Airstrip* and *Primapore* trade marks throughout the EEA, but will require any purchaser to grant a royalty-free perpetual licence back to the Joint Venture in relation to the use of *Airstrip* in the UK, and a royalty-free perpetual licence back to S&N for the use of the *Primapore* and *Airstrip* trade marks in relation to advanced wound care products<sup>7</sup> throughout the EEA. S&N undertakes to enter into a covenant with the purchaser of these businesses that it will procure that the Joint Venture will not market a professional FAD product under the *Primapore* or *Airstrip* names in the EEA for five years (with the exception of *Airstrip* in the UK). In relation to the *Cicaplaie* and *Tenso* trade marks, the parties will grant a purchaser a royalty-free perpetual licence<sup>8</sup> in relation to these marks in the territories concerned.

2.5 The parties undertake that if requested by the purchaser, they will (a) supply semi-processed materials at cost to the purchaser and (b) make available such equipment as to permit the purchaser to finish the manufacturing process in house. The parties also undertake, if requested, to provide to the purchaser all necessary technical know how required to operate the equipment referred to in

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<sup>7</sup> Advanced wound care products include advanced wound dressings, IV dressings, burn garments and incise drapes.

<sup>8</sup> The reference to "perpetual licences" means a licence where the licensor cannot normally terminate the licence and where the term is either indefinite or stated to be the maximum permitted under the relevant national law (for example, the parties believe that a term of over 30 years would not be acceptable under German civil law).

(b) above. The Trustee (see 3 below) shall review the terms of the contract between the parties and the purchaser to ensure, if necessary by amending the contract, that the semi-processed materials are sold at cost and are made available in sufficient quantities to ensure the viability of the divested professional FADs businesses.

***Fixation bandages***

2.6 The parties undertake to divest the S&N *Albu* range of products (incorporating the *Albusilk*, *Albupore*, *Albufilm* and *Albuplast* product ranges) across the EEA (with the exception of France). The parties also undertake to divest the following further S&N businesses (which include all S&N's fixation bandage businesses in Germany and the Netherlands):

- (a) in Germany, the Netherlands and Austria, the business carried on under the *Hypafix* and *Easifix* brands; and
- (b) in the Netherlands, the business carried on under the *Sleek* brand as well as S&N's business of distributing third party products.

2.7 In each case, the business to be divested will include:

- (a) goodwill;
- (b) details of customer contacts;
- (c) current price lists and actual pricing information;
- (d) an assignment to the purchaser of all existing commercial agreements with customers and suppliers and all agreements entered into between the date of the Commitment and the closing of the sale of the Divestments;
- (e) a transfer of technical know how, all other intellectual property rights and all other confidential and non-confidential information existing in relation to the products to be divested (see below for details as to trade mark rights);
- (f) all stocks of raw materials and finished products;
- (g) to the extent permitted by law or contract, and to the extent requested by the purchaser, either on a temporary or permanent basis, employees of the parties whose services are necessary for the sales and marketing of the transferred businesses. If the purchaser so requests, the parties undertake to negotiate in good faith putting the said personnel at the disposal of the purchaser on a temporary basis or transferring them to the purchaser indefinitely. The parties also agree not to hire or solicit such transferred personnel for a period of two years from the date of the sale of the assets.

- 2.8 In relation to the trade marks referred to in 2.6 above, the parties will assign S&N's ownership of the *Albu* family of trade marks to the purchaser throughout the EEA. The parties will, however, require the purchaser to grant to the Joint Venture a perpetual royalty-free licence back of the *Albu* brands in France. In relation to the *Hypafix*, *Easifix* and *Sleek* trade marks, the parties would grant the purchaser of these businesses a royalty-free perpetual licence in the territories concerned.
- 2.9 The parties undertake that if requested by the purchaser, they will (a) supply semi-processed materials at cost to the purchaser and (b) make available such equipment as to permit the purchaser to finish the manufacturing process in house. The only exception to this would be for the *Easifix* product range where the parties will, if requested, supply finished products, at cost, to the purchaser. The parties also undertake, if requested, to provide to the purchaser all necessary technical know how required to operate the equipment referred to in (b) above. The Trustee (see below) shall review the terms of the contract between the parties and the purchaser to ensure, if necessary by amending the contract, that the semi-processed materials are sold at cost and are made available in sufficient quantities to ensure the viability of the divested fixation bandage businesses.

#### ***Support bandages***

- 2.10 The parties undertake to divest a number of support bandage businesses:
- (a) Beiersdorf's *Uniflex* crepe bandage business throughout the EEA (excluding Germany);
  - (b) S&N's crepe bandage business throughout the EEA (excluding the UK), to include the *Elastocrepe* and *Tensocrepe* brands;
  - (c) S&N's supply of own label crepe bandages to wholesalers in the UK. This will be divested by the parties procuring the novation of these agreements to the purchaser and by the parties agreeing that neither they nor the Joint Venture will supply own label crepe bandage products in the UK for [a fixed period of more than 3] years;
  - (d) S&N's support bandage business in Denmark (currently consisting of the distribution of the *Tubigrip* brand products on behalf of SSL in Denmark). S&N will terminate this arrangement thereby allowing SSL to appoint a new distributor (alternatively SSL might choose to distribute the product itself);
  - (e) Beiersdorf's *Elodur* business in Belgium and Italy and its *Elastoplast* support bandage business in Belgium;
  - (f) S&N's *Idealbinde* business in Denmark; and

- (g) S&N's tubular bandage business (sold under the *Tensogrip* brand) and *Extensoplast* support bandage business in Italy.

2.11 In each case, the business to be divested will include:

- (a) goodwill;
- (b) details of customer contacts;
- (c) current price lists and actual pricing information;
- (d) an assignment of all existing commercial agreements with customers and suppliers and all agreements entered into between the date of the Commitment and the closing of the sale of the Divestments;
- (e) a transfer of technical know how, all other intellectual property rights, and all other confidential and non-confidential information existing in relation to the products to be divested (see below for details as to trade mark rights);
- (f) all stocks of raw materials and finished products;
- (g) to the extent permitted by law or contract, and to the extent requested by the purchaser, either on a temporary or permanent basis, employees of the parties whose services are necessary for the sales and marketing of the transferred businesses. If the purchaser so requests, the parties undertake to negotiate in good faith putting the said personnel at the disposal of the purchaser on a temporary basis or transferring them to the purchaser indefinitely. The parties also agree not to hire or solicit such transferred personnel for a period of two years from the date of the sale of the assets.

2.12 In relation to the trade marks referred to in 2.10 (a) and (b) above, the parties undertake to assign Beiersdorf's ownership of the *Uniflex* trade mark throughout the EEA, but will require the purchaser to grant a royalty-free perpetual licence back to the Joint Venture in Germany. The parties will assign S&N's ownership of the *Elastocrepe* and *Tensocrepe* trade marks throughout the EEA, but will require the purchaser to grant a royalty-free perpetual licence back to the Joint Venture in the UK. In relation to the *Elodur*, *Extensoplast*, and *Elastoplast* trademarks, the parties will grant a royalty-free perpetual licence to the purchaser of these businesses. *Idealbinde* is not a registered trade mark, but the parties will agree not to use this name in Denmark on support bandage products for a period of [more than one year] from the sale of the business.

#### ***Plaster of Paris***

2.13 The parties undertake to divest Beiersdorf's plaster of Paris business in Spain.

- 2.14 In each case, the business to be divested will include:
- (a) goodwill;
  - (b) details of customer contacts;
  - (c) current price lists and actual pricing information;
  - (d) an assignment to the purchaser of all existing commercial agreements with customers and suppliers and all agreements entered into between the date of the Commitment and the closing of the sale of the Divestments;
  - (e) a transfer of technical know how and all other intellectual property rights existing in relation to the products to be divested (see below for details as to trade mark rights);
  - (f) all stocks of raw materials and finished products;
  - (g) to the extent permitted by law or contract, and to the extent requested by the purchaser, either on a temporary or permanent basis, employees of the parties whose services are necessary for the sales and marketing of the transferred businesses. If the purchaser so requests, the parties undertake to negotiate in good faith putting the said personnel at the disposal of the purchaser on a temporary basis or transferring them to the purchaser indefinitely. The parties also agree not to hire or solicit such transferred personnel for a period of two years from the date of the sale of the assets.
- 2.15 As regards trade marks, the purchaser will be granted a royalty-free perpetual licence of the *Platrix* family of brands in Spain.
- 2.16 The parties also undertake to grant the purchaser an option to acquire Beiersdorf's plaster of Paris manufacturing equipment (also located in Spain) along with all technical know how required to manufacture the products.

### 3. **Procedural Issues**

#### ***Behaviour pending the sale(s)***

- 3.1 Pending completion of the disposal of the businesses referred to in 2 above (together the "Divestments"), and with effect from the date when S&N and Beiersdorf ("the parties") acquire control of the Joint Venture, the parties undertake:
- (a) to use best endeavours to ensure, that so far as relevant, the Divestments are managed as saleable businesses;
  - (b) to use best endeavours to preserve, in accordance with good commercial

practices, the full economic value of the Divestments until the date of completion of the sale of the Divestments and to use reasonable efforts to manage the Divestments in the best interests of the Divestments. In particular, the parties agree not to carry out upon their own authority any act which may have a significant impact on the economic value, the management, or competitiveness of the Divestments until the date of completion of the sale of the Divestments. The parties also agree not to carry out upon their own authority any act which may be of such a nature as to alter materially the nature or scope of the activity of the Divestments, or the industrial or commercial strategy of the Divestments. Sufficient resources shall be made available to the Divestments, to ensure they develop until the date of completion of their sale, and the value of such resources shall be in accordance with good commercial practices; and

- (c) to use and provide sufficient working capital for the Divestments.

***Timing of and conditions relating to the Divestments***

- 3.2 The parties undertake, subject to the provisions set out below, to effect the sale of the Divestments within [a fixed period of less than one year ] (the "Initial Divestment Period") from the date of the Decision to: in the case of the sale being effected as a single package, one independent third party purchaser approved by the Commission; or, in the case of the sale being effected as two or more packages, two or more independent third party purchasers approved by the Commission. The Commission may, upon a fully documented and reasoned request from the parties, extend the period within which the sale of all or any part of the Divestments may be effected (for the avoidance of doubt the Initial Divestment Period shall then include any such extension). Such extension may be made more than once in relation to all or any part of the Divestments.
- 3.3 The Commission shall determine whether a proposed purchaser of all or any part of the Divestments meets with its approval pursuant to 3.2 above in accordance with the following criteria:
  - (a) the purchaser is a viable existing or potential competitor, independent of and unconnected to the parties, possessing the financial resources, proven expertise and having the incentive to maintain and develop the divested business as an active competitive force in competition with the Joint Venture;
  - (b) the purchaser can reasonably be expected to obtain all relevant merger clearances within the EEA;
  - (c) where no merger clearances are required, no appreciable competition concerns would be raised by the transfer of some or all of the Divestments to the purchaser; and

(d) the purchaser is deemed likely to obtain all authorisations and consents required to effect a transfer of the Divestments.

3.4 Subject to paragraphs 3.5 and 3.6 below, the parties shall be deemed to have complied with paragraph 3.2 above, if within the [ Initial Divestment Period], or any extension of that period, a binding sale contract or contracts conditional only upon necessary approvals has/have been entered into in relation to the Divestments. The sale or sales shall have been completed within [a stipulated period after] such contract(s) [have been ] entered into, although this period may be extended by the Commission on request by the parties where they show good cause for such extension.

***Commission approval of purchaser and contracts***

3.5 The Commission shall use reasonable endeavours to communicate its approval or non approval within 15 working days of receipt of a report identifying a prospective purchaser in accordance with paragraph 3.3. In each case, failure of the Commission to communicate its approval or non-approval shall delay the running of the [Initial Divestment Period] set out in paragraph 3.4 above until the Commission communicates its approval or non-approval. The Commission has the right to ask the purchaser for business plans and/or to interview the purchaser at the Commission's premises.

3.6 Any contract entered into pursuant to this Commitment shall be made conditional upon the prior express approval by the Commission of the contract. Within 15 working days of receipt of a contract from the parties, the Commission shall communicate to the parties such approval or any reasons for its non-approval thereof.

***Appointment of Trustee***

3.7 Within 5 working days of the Decision the parties shall appoint a trustee (the "Trustee") in accordance with the provisions below:

3.8 The parties shall propose to the Commission, as soon as possible after the Decision, the names of at least two institutions unconnected from it to be appointed as Trustee. Such Trustee shall be an investment bank, a management consulting company or an auditor. The Trustee shall be independent of the parties, possess the necessary qualifications to carry out the job and shall not be the object of a conflict of interest.

3.9 The Commission shall have the discretion to approve or reject (on reasonable grounds) one or all of the names submitted. If only one name is approved the parties shall appoint or cause the institution concerned to be appointed as Trustee. If more than one name is approved the parties shall be free to choose the Trustee to be appointed from among the names approved. The Commission will indicate in writing its approval or rejection of all names within 5 working days of the proposal of such names being made. Any names which are not



rejected within this period shall be deemed to have been approved.

- 3.10 If all the names submitted are rejected, the parties shall submit the names of at least two further such institutions (“the further names”) within 10 working days of being informed of the rejection. The Commission shall have the discretion to approve or reject (on reasonable grounds) one or all of the further names submitted. If only one such further name is approved by the Commission, the parties shall appoint or cause the institution concerned to be appointed as Trustee. If more than one further name is approved the parties shall be free to choose the Trustee to be appointed from among the approved names. The Commission will indicate in writing its approval or rejection of the further names within 10 working days of the proposal of such names being made. Any names which are not rejected within this period shall be deemed to have been approved.
- 3.11 If all further names are rejected by the Commission, the Commission shall nominate an institution, which shall be suitably qualified, and the parties will appoint or cause this institution to be appointed as Trustee.
- 3.12 The 10 working day periods referred to in paragraphs 3.9 and 3.10 may be extended by the Commission by five working days.

***Role of the Trustee***

- 3.13 During the Initial Divestment Period the Trustee shall provide written reports to the Commission on the progress of the sale of the Divestments. Such reports will be provided on a two monthly basis commencing two months after the Decision and will advise the Commission:
- (a) as to the selection of possible purchasers and to the conduct of the negotiations with those purchasers;
  - (b) as to whether the party or parties selected by the Commission are likely to meet the requirements of paragraph 3.3 above;
  - (c) as to whether the Divestments are being managed in the ordinary course, pursuant to good business practice, in compliance with paragraph 3.1 above.
- 3.14 Throughout the term of his appointment, the Trustee will have the right to propose, and if deemed necessary by the Commission, to impose, all measures which the Trustee considers necessary to ensure compliance with the Commitment.
- 3.15 Where the parties have failed to effect a sale of the Divestments within the Initial Divestment Period, the parties agree to give the Trustee an irrevocable and exclusive mandate to find a purchaser or purchasers for the part of the Divestments (in relation to which such a contract has not been entered into) on

reasonable terms within a [stipulated period] from the end of the Initial Divestment Period. The Trustee shall be bound by the same terms in relation to the approval of purchasers and contracts as are set out above in relation to the parties for the Initial Divestment Period. The Commission may, upon the Trustee's request from time to time, extend the period within which such sale of all or any part of the Divestments may be effected. Such extension may be made more than once in relation to all or any part of the Divestments. The parties undertake to provide the Trustee with all reasonable assistance and information necessary for the execution of this task by the Trustee and shall be kept informed by the Trustee of all negotiations regarding finding a purchaser for the relevant Divestments.

- 3.16 The parties will sign or will procure the signature of a binding sale contract or contracts conditional only upon necessary regulatory or other approvals with a purchaser or purchasers found by the Trustee.
- 3.17 As soon as the specific remedy with which the Trustee has been entrusted has been implemented, the Trustee shall request the Commission to be *discharged*. However, the Commission may at any time require the reappointment of the Trustee if it subsequently appears that the relevant remedies have not been fully and properly implemented.
- 3.18 The Trustee's professional charges and expenses will be paid by the parties.

#### 4. **General**

- 4.1 For the avoidance of doubt, the Commitment shall lapse and cease to have any legal effect in the event that the Joint Venture is not fully completed. In such circumstances, the appointment of any Trustee pursuant to the provisions of the Commitment shall be deemed to be automatically revoked.

signed

**For and on behalf of Smith & Nephew plc and Beiersdorf AG**

**26 January 2001**

## APPENDIX 1

### Beiersdorf Businesses

<b>Territory</b>	<b>Product market</b>	<b>Products to be divested</b>
EEA excluding Germany	Support bandages	Uniflex
Belgium	Support bandages	Elastoplast
Belgium and Italy	Support bandages	Elodur
Spain	Plaster of Paris	Platrix/Biplatrix

## APPENDIX 2

### Smith & Nephew Businesses

<b>Territory</b>	<b>Product market</b>	<b>Products to be divested</b>
EEA excluding the UK	Professional FADs	Airstrip

EEA excluding France	Fixation bandages	Albu range (Albupore, Albusilk, Albufilm and Albuplast)
EEA excluding the UK Austria, Germany and Netherlands	Support bandages Fixation bandages	Tensocrepe, Elastocrepe Hypafix and Easifix
Denmark Germany Italy	Support bandages Professional FADs Support bandages	Tubigrip, Idealbinde Cicaplaie and Tenso Extensoplast and tubular bandages (Tensogrip)
Netherlands Netherlands	Professional FADs Fixation bandages	Tenso Sleek and all third party products currently distributed by S&N
UK	Support bandages	Private label business