EN

Case No COMP/M.4540 - NESTLE / NOVARTIS (Medical Nutrition Business)

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(2) NON-OPPOSITION
Date: 29/06/2007

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29/06/2007

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(2) DECISION

To the notifying party:

Dear Sir/Madam,

Subject: Case No COMP/M.4540-NESTLE/ NOVARTIS (Medical nutrition business)
Notification of 07/05/2007 pursuant to Article 4 of Council Regulation No 139/2004[1]

1. On 7.05.2007, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ("The Merger Regulation") by which the undertaking Nestlé S.A. (hereinafter referred to as "Nestlé") acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of Novartis Medical Nutrition business (hereinafter referred to as "NMN") from Novartis AG (hereinafter referred to as "Novartis") by way of purchase of shares and assets.

I. THE PARTIES

2. **Nestlé** is a Swiss company active worldwide in the production, marketing and sale of a large variety of food and beverage products. As regards special nutrition, Nestlé is active in four major areas: infant nutrition, healthcare nutrition, weight loss coaching centres and performance nutrition. Nestlé's brands in healthcare nutrition are *Clinutren*, *Sondalis*, *Peptamen*, *Crucial* and *Modulen*. Nestlé's worldwide sales in 2006 amounted to € 62.5 billion. Its healthcare nutrition business generated worldwide sales of € […], out of which € […] were achieved in the EEA and € […] in France.

[1] OJ L 24, 29.1.2004 p. 1.

3. **NMN** is part of the consumer health division of the Swiss company Novartis and is active worldwide in the development, manufacture, marketing, distribution and sale of healthcare nutrition products and related medical devices (tubes, pumps, etc.). NMN' main brands in healthcare nutrition are *Isosource, Novasource, Resource* and *Impact* NMN achieved in 2006 a global turnover of € 771 million, out of which € […] were achieved in the EEA.

II. THE OPERATION AND THE CONCENTRATION

4. Pursuant to a Sale and Purchase Agreement signed on 14 December 2006, Nestlé will acquire the entire global healthcare nutrition business from Novartis. The proposed operation involves the acquisition of all NMN subsidiaries and all other NMN assets.

5. The notified operation will confer on Nestlé sole control over NMN. It therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

6. The combined aggregate worldwide turnover of the undertakings concerned exceeds €2.5 billion (Nestlé: €62 billion, NMN: €771 million). The Community-wide turnover of each undertaking concerned is more than €100 million (Nestlé: €[…], NMN: €[…]. The combined turnover of the two undertakings concerned is more than €100 million in […], where each undertaking achieves a turnover of more than €25 million. Neither Nestlé nor NMN achieves more than two thirds of its turnover in one and the same Member State. Therefore, the notified operation has a Community dimension within the meaning of Article 1(3) of the EC Merger Regulation.

IV. RELEVANT MARKETS

7. The proposed transaction concerns the production and sale of healthcare nutrition products, in particular enteral nutrition products (for the distinction between enteral and parenteral see below). NMN is the second leading European supplier of enteral healthcare nutrition products in the EEA, with a strong presence in Spain, Germany and France, whereas Nestlé ranks as number five. The concentration will lead to horizontal overlaps as well as one vertical overlap in France, where, in addition to the parties' activities in the supply of healthcare nutrition products, Nestlé provides healthcare nutrition services to patients at home.

A. Relevant product markets

1. Healthcare nutrition products

8. Healthcare nutrition products are used as a supplement to or substitution for regular diets for individual of all ages with special nutritional needs.

9. Healthcare nutrition products are composed of macronutrients, which are substances needed for energy, growth and metabolism in the human body. Macronutrients are carbohydrates (including fibre), protein and fat. To meet complete nutritional requirements, some micronutrients (vitamins and minerals) are also added. For oral products taste may be important and flavour substances are used (for the distinction between tube and oral products see below).

Parenteral and enteral nutrition products

10. There are two routes to deliver healthcare nutrition products to the patient: parenteral nutrition products are delivered directly into the blood thereby by-passing the absorption system; enteral nutrition products are delivered via the intestinal tract, either orally if the patient is able to drink (sip-feeding) or directly into the gastric tract through the stomach via tubes and pumps (tube-feeding). In previous Commission decisions[2], the market for healthcare nutrition products was considered, but ultimately the Commission left open in those decisions whether parenteral and enteral nutrition products belong to one healthcare nutrition market or are to be considered as different product markets.

11. The notifying party submits that parenteral and enteral nutrition products belong to the same product market. Firstly, the notifying party argues that parenteral and enteral nutrition products contain the same basic nutrients and fulfil the same basic purpose in that they cover the patient's nutrition requirements. Second, Nestlé points out that there are relatively few medical conditions where enteral nutrition is clearly contraindicated (obstructed gastrointestinal tract) and it estimates that this is the case for approximately 30% of all patients who are fed parenterally. Last of all, according to Nestlé, the same is true in relation to parenteral nutrition which is contraindicated in only a very limited number of cases (10%).

12. The notifying party does not contest that within the medical community, the general guidelines are to use enteral nutrition when the gastrointestinal tract is functional[3]. However, it submits that the determination whether this is the case is not always simple and that medical staff will take their decisions on other, more practical, considerations, which would speak in favour of parenteral nutrition (comfort of the patient, easier use of parenteral for medical staff, nurses better trained for intravenous provision than for placement of enteral tubes). Based on the above arguments, the notifying party view parenteral and enteral products as fully interchangeable and therefore belonging to the same product market.

13. The market investigation did not confirm the notifying party's views as regards the scope of the product market.

14. Regarding demand-side substitutability, it follows from the information provided by the notifying party that a group of patients, who do not have a functioning gastro-intestinal tract, are dependent on parenteral nutrition products and are not in a position to switch to enteral nutrition products. As to patients for which both types of products could be used without risks to the patients' health, the market investigation confirmed that, due to medical customs and practical considerations, some practitioners may have a preference for parenteral products compared to tube-feeding in certain situations despite the fact that the gastrointestinal tract is functional. However, this is only true for tube-fed patients, whereas sip-feed patients would not be given parenteral products.

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2 In cases IV/M. 058 Nestlé/Baxter/Salvia where the Commission states that "*the clinical nutrition market is composed of at least two submarkets, the enteral nutrition market i.e. foods products taken orally or by tube, and the parenteral nutrition market i.e. pharmaceutical preparations delivered directly into the blood*" and COMP/M.4010 – Fresenius/Helios.

3 See Guidelines of the American Society for Parenteral and Enteral Nutrition (ASPEN).

15. As regards prices, parenteral nutrition products are much more expensive than enteral nutrition products. For a caloric intake of 1500 kcal, which is the average nutrition required to feed a patient for 24 hours, data submitted by Nestlé show that prices for parenteral nutrition products range from €24.5 in Czech Republic to €98.8 in the UK whereas for enteral tube-feeding products, prices range from €6.2 in Hungary to €16.9 in Italy[4]. Prices for enteral sip-feeding products are even lower.

16. The market investigation confirmed that the costs incurred by a hospital to feed a patient are much higher for parenteral products than for enteral products. Although these costs differ from country to country, the overall picture is the same in the EEA. French hospitals which have responded to the market investigation indicated that total costs[5] vary from €10 to €125 in enteral nutrition according to the length of the treatment whereas for parenteral nutrition they vary from €90 to €1,000. These costs are only diet-related and do not take into account the costs related to these services (medical devices, nursing and medical staff); if those costs were taken into account, the differences between enteral and parenteral products would be even more pronounced.

17. The notifying party argues that the price of healthcare nutrition play a minor role in comparison to the total costs incurred by a patient in an intensive care unit (€3,000 per day), where many patients first receive healthcare nutrition products. Therefore, the decision of what type of nutrition to give to patients in an intensive care unit is very rarely made for economic reasons.

18. The Commission acknowledges that in hospitals, medical habits may lead practitioners to use parenteral nutrition even if general guidelines recommend enteral nutrition when the intestinal tract is functioning. It may also be true that doctors in hospitals consider prices of healthcare nutrition of secondary importance. A small but significant price increase of enteral or parenteral nutrition respectively would therefore not influence such decisions[6].

19. In any event, costs incurred by hospitals are only a part of the total costs incurred by the healthcare system overall in relation to patients that require healthcare nutrition products . The outpatient market represents a significant proportion of the enteral nutrition market[7].

20. Regarding supply-side substitutability, it appears that although parenteral and enteral products may contain the same basic nutrients, the chemical composition is different. For enteral nutrition products, as the patient may at least use parts of the digestive system, proteins and carbohydrate sources can be of polymeric nature (whole proteins and maltodextrins) similar to those found in normal food. Parenteral products must be in a chemical composition that the body can readily utilize as the digestive track is circumvented when the nutrients enter directly the blood stream. As a consequence,

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4 Spain is the only country where prices for enteral nutrition products are in the same range as prices for parenteral products reflecting, according to the parties, the importance that has been historically been attributed to nutritional considerations by Spanish health authorities

5 For a caloric intake of 1500 kcal per day

6 However, hospitals budgets are under increased pressure and the intensive care units could be the extreme example in which nutrition costs may not play any role for decisions about resource use.

7 In the EEA, [20-30]% of parenteral products and [60-70]% of enteral products are sold to the "outpatient channel" (homecare providers and pharmacies). See Form CO annex 8.2.1.

parenteral products do not contain whole proteins but amino acids[8], carbohydrates are molecules of glucose (and not complex molecules as in enteral nutrition) and lipids must be emulsified to be infused in a watery environment like blood.

21. Moreover, there are significant differences between enteral and parenteral products as regards the regulatory environment. Parenteral products are regulated as pharmaceutical products[9]. They cannot be marketed without a market authorization from health agencies. Enteral nutrition products are regulated as "Dietary Foods For Special Medical Purposes" pursuant to Commission Directive 1999/21/EC of 25 March 1999 on Dietary Foods for Special Medical Purposes[10] (hereinafter "the FSMP Directive"). FSMP rules are significantly less demanding than regulations covering pharmaceuticals. To launch a product, the supplier is only required to notify the competent authority of the Member State where the product is being marketed by forwarding to it a model of the label used for the product[11]. Once the authorities have been notified in accordance with the FSMP regulations, the sale and marketing of the product is legally allowed and there is no need to wait for an authorization from the national authority.

22. The main suppliers of enteral nutrition products in the EEA (Nestlé, NMN, Numico and Abbott) are specialised in enteral nutrition whilst other market players such as Baxter and Aguettant only supply parenteral nutrition products. Fresenius and B. Braun, which are active in both enteral and parenteral nutrition, confirmed that the technologies used in production are quite different and that they manufacture these products in dedicated production facilities. Respondents to the market investigation indicated that a switch from enteral to parenteral nutrition manufacturing would require significant investments as regards production and packaging capabilities, as well as product and technical knowledge.

23. In view of the lack of demand and supply-side substitutability, the Commission considers that enteral nutrition products and parenteral nutrition products are distinct product markets. The parties' activities only overlap on the market for enteral nutrition.

Tube-feeding and sip-feeding (oral) products

24. As mentioned above, enteral nutrition products can be delivered either orally if the patient is able to drink (sip-feeding) or directly into the gastric tract through the stomach via tubes and pumps (tube-feeding). Both types of enteral products are available in liquid or powder form although packaging may differ. Packaging includes plastic bottles and pouches for tube-feeding, plastic cups, plastic and glass bottles, cans, tetra packs and sachets for sip-feeding.

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8 The digestive process breaks down proteins into amino acids (the building blocks of the proteins), which are then absorbed by the intestine and used by the body for its vital functions.

9 ATC code B05BA "Solutions for parenteral nutrition".

10 The FSMP Directive defines these products as "a category of food for particular nutritional uses specially processed or formulated and intended for the dietary management of patients with a limited, impaired or disturbed capacity to take, digest, absorb, metabolize or excrete ordinary foodstuffs or certain nutrients contained therein (…) whose dietary management cannot be achieved only by modification of the normal diet, by other foods for particular nutritional uses, or a combination of the two"

11 See article 5 of the FSMP directive.

25. The notifying party submits that tube-feeding and sip-feeding products belong to the same product market. Nestlé points out that there are many situations where a patient can consume either tube-feeding or sip-feeding products and a number of the products of Nestlé and NMN are used as both sip-feeding and tube-feeding nutrition ("dual-use products"). After surgery, a patient may start by receiving an enteral nutrition product by tube feed. Once this patient is able to consume again via the oral route, he will continue to use exactly the same product, drinking it orally. This is possible since these dual-use products are liquid products, flavoured and packet in bottles, which allow a convenient oral use. Furthermore, according to the parties, a manufacturer of sip-feeding products can easily and with no additional costs switch to tube feeding products.

26. Respondents to the market investigation confirmed that many enteral nutrition products sold by the parties and their competitors can be used both for tube-feeding and sip-feeding purposes. Although the general guidelines within the medical community are to give oral products if the patient is able to swallow, the combined usage of tube and sip appears to be rather widespread[12]. There are some patients for whom the use of sip-feeding products cannot be viewed as an equivalent substitute (obstructive tumour of the upper gastro-intestinal tract, swallowing disorders like dysphagia) but in the majority of cases, tube-feeding and sip-feeding products could be used in parallel.

27. The market investigation also indicated that supply-side substitutability plays an important role. Competitors of Nestlé and NMN indicate that tube-feeding and sip-feeding products are manufactured on the same product lines and using same equipment and production processes, although there may be some differences which are linked to the choice of packaging by some competitors (tetra-paks for sip-feeding products which require aseptically filling instead of terminal sterilisation).

28. In any case, the question of a further distinction within enteral nutrition between sip-feeding and tube-feeding (oral) products can be left open since it would not materially change the competitive assessment.

Standard and speciality products

29. A further distinction within enteral nutrition products could be drawn between standard speciality products. Standard products contain the regular combination of macronutrients and micronutrients and are primarily designed to provide the essential nutrition intake for people suffering from malnutrition. Speciality products address nutritional needs of patients with specific diseases or specific medical conditions. Suppliers of these products differentiate them by adding different ingredients which are believed to be particularly beneficial for a specific condition such as diabetes, cancer, wound to heal, pulmonary problems or Crohn disease[13].

30. The notifying party submits that a further distinction between standard and speciality products should not be made. They argue that both standard and speciality products provide complete nutrition and more than 70% of the patients suffering from a specific

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12 For example a malnourished patient can absorb sip-feeding in the day whereas tube-feeding is given during the night to ensure a minimal nutritional intake.

13 Crohn disease is an inflammatory condition of the gastro-intestinal tract.

disease are fed with standard products. They also argue supply-side substitutability, as both types of products are composed of similar ingredients and are manufactured on the same production lines.

31. The market investigation was not conclusive as regards a possible distinction between standard and speciality products. On the one hand, customers of the parties indicated that standard and speciality products contain the same basic nutrients in the same composition. For the majority of patients standard products will provide acceptable nutritional support and a large proportion of patients suffering from a specific disease (between 40 and 90%, depending on the medical condition) are, indeed, fed with standard products. This is all the more true since in many EEA countries, there are few or even no disease-specific products available.

32. On the other hand, some respondents underline that speciality products have been developed to more closely meet the nutritional needs of patients with specific diseases and that from a medical benefit perspective, they cannot be substituted. As mentioned above, speciality products contain specific ingredients designed for patients with a specific illness or condition. Furthermore, patients suffering from certain specific conditions such as chronic renal failure, hepatitis or diabetes would not be fed with standard products, which could be dangerous for them. The rather low penetration of speciality products reflects the fact that these products have been introduced only recently and practitioners are not fully aware of their benefits for the patients. The percentage of patients suffering from a specific disease and treated with standard products will gradually decrease in the near future, due to the strong innovation in this field and the increasing familiarity of the medical community with healthcare nutrition products.

33. As regards supply-side substitutability, it should be noted that specialty products are the area of healthcare nutrition where patents play a significant role. According to the parties, only […]% of all Nestlé and NMN products contain nutrients which are (or have been) covered by patents[14]. However, the majority of these products are speciality products for wound healing, diabetes or gastro-intestinal disorders.

34. Based on the above, although all enteral nutrition products appear to be substitutable for a majority of patients, the growing awareness of practitioners and the dynamics of innovation in speciality products speak in favour of segmentation between standard and speciality products. For the purpose of the present case, this question can ultimately be left open as it would not materially change the competitive assessment.

Distribution channels

35. Enteral nutrition products are distributed through two main channels : the inpatient channel which comprises hospitals and long term institutions (e.g. nursing homes) and the outpatient channel which encompasses pharmacies and homecare providers of medical services (including nutrition) to patients at home[15].

36. The conditions of competition between these distribution channels differ significantly. Hospitals often source their enteral nutrition products by putting the supply contract out to tender. In France and in Spain, the national markets that are the focus of this investigation,

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14 Form CO, page 118.

15 There are no homecare providers in Spain.

all major hospitals (General and University hospitals) source their products through tenders whereas smaller hospitals still often negotiate directly the sales with the manufacturer. Contracts are awarded for an average of two years and the tender is often split into "lots" (one or several lots for one product) in order for the contracting authority to source products from different suppliers should it wishes to do so.

37. The sourcing pattern in the outpatient channel is very different. Doctors prescribe the healthcare nutrition product which is delivered to the patient by pharmacies or homecare providers. The notifying party contends that the sourcing patterns and competition conditions of the hospital sector also affect the outpatient market. This would be because patients will often use the same enteral nutrition products at home, once they have been discharged from the hospital. However, the information gathered for France and Spain (see below) shows that such a "spill-over effect" is limited as a large part of the outpatient market consists of patients that have not been hospitalised.

38. A significant difference between competition conditions in the hospital channel and the outpatient channel results from the way national health care systems operate. In the hospital channel, the prices are negotiated between the supplier and the hospital or result from tenders and national health authorities do not decide on the publicly subsidised prices of individual products. In the outpatient channel, reimbursement prices decided by health authorities play a key role. They serve as the starting point for the pricing as the supplier will normally assume that a customer will not pay more for the product than what is reimbursed. This also affects pricing at "wholesale level". From the "reimbursement price," the supplier will deduct various discounts according to the customer group and the services they provide downstream (homecare provider or wholesalers/pharmacists). These discounts constitute their operating margin. On average, the price for the same product is lower in the hospital channel than in the outpatient channel.

39. In the light of the above, the Commission considers that sales of enteral products to the hospital channel and sales of enteral products to the outpatient channel constitute distinct product markets.

2. Medical devices

40. Medical devices facilitate the delivery of enteral nutrition products to the patients who are fed by tube. They form a mechanical system including pumps and feeding tubes inserted nasally in order to allow the enteral nutrition to reach the gastro-intestinal tract.

41. The notifying party submits that medical devices for enteral nutrition form a separate product market. The market investigation has confirmed this product market definition.

B. Relevant geographic markets

1. Healthcare nutrition products

42. In its earlier decisions[16] the Commission has left open the exact geographic scope of healthcare nutrition markets and assessed the markets both on a national and an EEA wide basis.

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16 COMP/M.4010 – Fresenius/Helios

43. In its notification, the notifying party submits that the markets for healthcare nutrition products have an EEA dimension. The following grounds would support this view: producers supply their customers from only one or two manufacturing sites in Europe, transport costs do not play a significant role, there are no barriers to trade and it is not necessary to have an authorization to sell a product on a national market (only notification to authorities is required). The notifying party also argues that similar ranges of products are sold in the different Member States and local tastes or brands do not play a significant role.

44. However, the Commission has found that market conditions are not homogenous in the EEA and several elements rather point to markets that are national in scope.

45. First, there are significant unexplained price differences among Member States.[17] Despite such price differences, the market investigation has not given any indications that parallel trade would have developed in these markets.

46. Second, the market presence of the parties and their competitors differ considerably from Member State to Member State. Market shares data submitted by the notifying party in the notification shows for example that Nestlé holds a strong position in France in enteral healthcare nutrition ([30-40]% in 2006) but, with the exception of Belgium ([10-20]%), has a market share below [0-10]% in all other Member States. Fresenius, a German producer, is the leading supplier in Germany with [30-40]% market share but achieves minimal sales in Italy and is absent in Spain. Local players which do not compete outside a national territory are active in national markets, such as Vegenat and Grifols, two Spanish suppliers of enteral nutrition products in Spain. Third, brand differentiation is found between national markets. The existence of national brands is acknowledged by the notifying party which submits, as regards its brand *Crucial* that, "*Crucial is a French brand generating only minor sales outside France*".[18]

47. Fourth, consumption growth shows different stages of market development. While globally the market for enteral nutrition products is growing rapidly, the growth is not expected to be in the same ranges in all Member States. The French market is estimated to grow by [5-10]% in the years 2006 to 2011 compared to a growth rate of [10-15]% in Spain and [5-10]% on average in the EEA[19].

48. Fifth, enteral nutrition distribution channels differ between Member States. While e.g. the homecare segment represents [10-20]% of the total sales of enteral nutrition products in France, there are no homecare customers in Spain. In line with this, the parties, as well as their competitors, have organised their marketing and sales on a national basis, either through their own subsidiaries or through local distributors.

49. Finally, the reimbursement systems are national. The competent authority of each Member State will decide on the basis of its own rules and following its own procedures whether or not a product may be reimbursed. While reimbursement is not a condition for introducing an enteral product on the market, reimbursement systems

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17 The notifying party provides in the notification information about the average prices of enteral products in each EEA Member State. This shows that prices vary from approximately €7 in Austria, Denmark, Finland and Germany, to €11 in France, Belgium and UK, €17 in Italy and €20 in Spain.

18 See "Explanatory note supporting the commitments under art.6(2) of the ECMR" submitted by the notifying party on 8.06.2007.

19 See Form CO, page 108.

play an important role in this industry. The notifying party submits that […][20]. Indeed, a vast majority of the products sold to the out patient segment are reimbursed.[21]

50. The findings of the market investigation detailed below confirm the relevance of the above-mentioned aspects that differentiate national markets and show that competition essentially takes place at national level. Indeed, customers unanimously confirmed during the market investigation that they have never purchased enteral nutrition products from a supplier that is not locally established.

51. In the market investigation, competitors confirmed that they view the markets for enteral nutrition products as national in scope. Competitors explained that a national organization of the sales of enteral nutrition products is a pre-requisite to become a significant competitor on a market. They have established country-dedicated sales forces, marketing personnel and local distribution networks and adapt their products to national consumer tastes or preferences (type of packaging, flavour of the products, preferences for the use of specialty products, etc.). They set different prices per country, primarily depending on the national reimbursement schemes and by distribution channel (in patients/out patients).

52. The time and costs associated with setting up a distribution network and defining a specific marketing policy, and the presence of national price regulations and registrations, constitute barriers to entry for a supplier not established in a national market. A new entrant will not only have to face competition from well established competitors but is also confronted with relatively conservative customers. This is not only true when practitioners with relatively little knowledge of healthcare nutrition decide on prescriptions but hospitals also tend to favour established suppliers. The notifying party submits[22] that "*NHC's contract renewal rate in France was approximately [60-70]% in 2006*" which shows that there is a high loyalty of hospitals vis-à-vis their suppliers of enteral nutrition products.

53. Existence of high barriers to entry and to expansion in national markets is also reflected in the planning of the notifying party as regards its entry into the Spanish market. Internal documents show that Nestlé […][23] The high barriers to entry are further evidenced by the absence, as pointed out by customers and competitors, of any new recent significant entrant in the enteral nutrition markets in Spain and France.

54. On the basis of the above considerations, the Commission has come to the conclusion that the market for enteral nutrition products has a national geographic dimension.

2. Medical devices

55. As regards medical devices for enteral healthcare nutrition, the notifying party submits that it is a worldwide market. The market investigation did not contradict this view. However, it is not necessary to conclude definitively on this for the purpose of the

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20 See Form CO, page 115.

21 The notifying party submits that approximately [80-90]% of the products sold by Nestlé and NMN are reimbursed. (Form CO, page 115).

22 Form CO, page 110.

23 See […].

present decision as it does not change the conclusions of the competitive assessment under any possible geographic market definition.

V. COMPETITIVE ASSESSMENT

56. The Commission has carefully assessed the effects of the transaction in light of the information gathered during its investigation, as well as in light of the arguments put forward by the parties and the concerns expressed by customers and market players.

57. The vast majority of Nestlé's sales of enteral nutrition products within the EEA ([60-80]%) are realised in France and Spain, where the transaction would bring together two of the main suppliers and create the clear market leader. In addition to France and Spain, the transaction will also give rise to affected markets in some other Member States.

58. However, in a number of these markets the transaction will only marginally increase the pre-existing market position of NMN. This is the case for Austria (Nestlé, [0-5]%; NMN, [30-40]%)[24], Finland (Nestlé, [0-5]%; NMN, [10-20]%)[25], Italy (Nestlé, [0-5]%; NMN, [30-40]%)[26], Sweden (Nestlé, [0-5]%; NMN, [40-50]%)[27] and Norway (Nestlé, [0-5]%; NMN, [10-20]%)[28].

59. In some other markets, the increment is higher but the combined entity will not gain a significant position and will face competition of several actors with higher market shares. This is the situation in Germany, where the combined entity will have a market share of [20-30]% (Nestlé, [5-10]%; NMN, [10-20]%)[29], behind Fresenius ([30-40]%) and close to Numico ([20-30]%) and Greece with a combined market share of [20-30]% (Nestlé, [5-10]%; NMN, [10-20]%)[30], the market leader being Numico ([30-40]%) and other actors include Fresenius ([20-30]%) and Abbott ([10-20]%).

60. Although some customers expressed more general concerns that the concentration may have detrimental effects on competition in the enteral nutrition products in the EEA markets, the Commission cannot conclude that the planned transaction would raise serious doubts as to its compatibility with the Common Market outside the French and Spanish markets. Accordingly, the rest of the decision will focus of the French and Spanish markets of enteral nutrition products.

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24 On the hospitals market (Nestlé, [0-5]%; NMN, [30-40]%); on the outpatient market (Nestlé, [0-5]%; NMN, [40-50]%).

25 On the hospitals market (Nestlé, [0-5]%; NMN, [30-40]%); on the outpatient market (Nestlé, [0-5]%; NMN, [10-20]%).

26 On the hospitals market (Nestlé,[0-5]%; NMN, [30-40]%); on the outpatient market (Nestlé, [0-5]%; NMN,[30-40]%).

27 On the hospitals market (Nestlé, [0-5]%; NMN, [40-50]%); on the outpatient market (Nestlé, [0-5] %; NMN, [40-50]%).

28 On the hospitals market (Nestlé, [0-5]%; NMN, [10-20]%); on the outpatient market (Nestlé, [0-5]%; NMN, [10-20]%).

29 On the hospitals market (Nestlé, [0-5]%; NMN, [20-30]%); on the outpatient market (Nestlé,]5-10]%; NMN, [10-20]%).

30 On the hospitals market (Nestlé,[0-5]%; NMN, [10-20]%); on the outpatient market (Nestlé, [10-20]%; NMN, [20-30]%).

A. French markets for enteral nutrition products

61. In France, the merger will bring together two main suppliers of enteral nutrition products and will also raise a vertical issue, as Nestlé is active in the homecare business, which provides enteral nutrition products as part of their services to patients.

1. Horizontal overlap

62. In the EEA, France is one of the main markets for the sale of enteral products in value. It has shown significant growth in the last years (10% between 2005 and 2006 and 7% between 2004 and 2005) and the parties expect the growth rate to be [5-10]% on average in the years 2006 to 2011. Three-quarters of the sales are directed to the out patient market (pharmacies and homecare companies), hospitals accounting for the remaining quarter.

63. The market shares in value over three years of the market players active in France are indicated in the following table:

Total sales of enteral nutrition products to all customers						
Suppliers	2004		2005		2006	
	K€	%	K€	%	K€	%
Nestlé	[45-60.000]	[30-40]%	[45-60.000]	[30-40]%	[45-60.000]	[30-40]%
NMN	[25-40.000]	[20-30]%	[25-40.000]	[20-30]%	[30-45.000]	[20-30]%
Combined	**[80-100.000]**	**[50-60]%**	**[80-100.000]**	**[50-60]%**	**[85-100.000]**	**[50-60]%**
Numico	[25-40.000]	[20-30]%	[25-40.000]	[20-30]%	[35-50.000]	[20-30]%
Lactalis	[0-10.000]	[0-5]%	[0-10.000]	[0-5]%	[5-15.000]	[0-5]%
Fresenius	[0-10.000]	[0-5]%	[0-10.000]	[0-5]%	[5-15.000]	[0-5]%
Abbott	[0-10.000]	[0-5]%	[0-10.000]	[0-5]%	[5-15.000]	[0-5]%
Others	[0-10.000]	[0-5]%	[0-10.000]	[0-5]%	[5-10.000]	[0-5]%
TOTAL (k€)	**[130-155.000]**		**[145-160.000]**		**[160-175.000]**	

Source: data submitted by the notifying party.[31]

64. The proposed transaction would lead to the creation of the leader in the French market for enteral nutrition products with a market share of [50-60]%, far from its next competitor, Numico with [20-30]% market share. Other smaller competitors include a local market player, the French company Lactalis which achieves all its sales of enteral nutrition products in France and the German company Fresenius, both holding [0-5]% market share. The market position of Abbott has to be put into question as information received in the market investigation indicates that Abbot intends to exit the market in 2007 and therefore would no longer represent a competitive force on the French market. With this exception, the market shares submitted by the parties have broadly been confirmed by the data collected from the other market players during the market investigation.

[31] Form CO, annex 7.1..

65. In the table below, market shares are indicated separately for the hospital and outpatient markets respectively as well as for the segments of standard and speciality products and tube and oral products:

Sales in France, 2006	Total enteral sold through all channels		All enteral sales to hospitals	All enteral sales to out patients	Standard enteral products sales to all customers	Specialty enteral products sales to all customers	Tube feeding enteral products to all customers	Oral enteral products to all customers
	K€	%	%	%	%	%	%	%
Nestlé	[45-60.000]	[30-40]%	[20-30]%	[30-40]%	[30-40]%	[20-30]%	[30-40]%	[30-40]%
NMN	[30-45.000]	[20-30]%	[30-40]%	[10-20]%	[10-20]%	[40-50]%	[20-30]%	[20-30]%
Combined	**[85-100.000]**	**[50-60]%**	**[50-60]%**	**[50-60]%**	**[50-60]%**	**[60-70]%**	**[50-60]%**	**[50-60]%**
Numico	[35-50.000]	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[20-30]%
Lactalis	[5-15.000]	[0-5]%	[5-10]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[5-10]%
Fresenius	[5-15.000]	[0-5]%	[5-10]%	[0-5]%	[5-10]%	[0-5]%	[10-20]%	[0-5]%
Abbott	[5-15.000]	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[0-5]%	[5-10]%
Others	[5-10.000]	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[0-5]%
TOTAL (k€)	**[160-175.000]**		**[35-50.000]**	**[115-130.000]**	**[105-120.000]**	**[45-60.000]**	**[35-50.000]**	**[120-135.000]**

Source: data submitted by the notifying party.[32]

66. The table shows that Nestlé and NMN have high market shares in all of the segments for enteral nutrition products. Market positions do not significantly differ on the basis of narrower markets for sales of enteral nutrition products to in patients (hospitals) and out patients (homecare and pharmacies).

67. In addition to the large market share of the combined entity and the significant addition brought about by the proposed transaction, the market investigation has revealed that Nestlé is a must have brand for enteral products in France.

68. In the notification, the notifying party submits that brands are of limited significance in the healthcare nutrition industry and explains that "*Given that this business is relatively new, brands are still largely unknown, especially relative to the food and beverage industries.*"[33] However, contrary to the notifying party's views, the Commission found in the notifying party's internal documents as well as during the market investigation, that brands play a role in the enteral nutrition market and that Nestlé is considered as having the must have brand in France.

32 Form CO, annex 7.1.

33 Form CO, page 77.

69. Nestlé markets three main brands in France, *Clinutren*, *Renutryl* and *Sondalis* which respectively represent […]%, […]% and […]% of its sales of enteral products.[34] Nestlé's internal documents show that one key element of its marketing strategy is branding. In one Nestlé's documents setting out its strategy for healthcare nutrition in France in 2005, […].[35] The brand focus of Nestlé's marketing strategy is further evidenced by the financial investment made by Nestlé in promoting its brands. In 2003, more than […]% of its total marketing budget was allocated to the promotion of […].

70. Furthermore, a survey cited by Nestlé in its marketing documents shows that […] [36] which in also acknowledged in an other Nestlé's internal document[37] where one of […]. Indeed […] is spontaneously named by approximately [60-70]% customers or prescribing doctors, far ahead from the competing brands. In addition, Nestlé is the only enteral supplier which has a second brand in the list of well-known brands. Overall, the portfolio of Nestlé brands enjoys the strongest brand awareness as shown by the results of a survey[38] conducted for Nestlé, where Nestlé is spontaneously named by [70-80]% of the respondents, while Numico and NMN rates are [40-50]% and [20-30]% respectively.

71. Not only Nestlé's internal documents but also the market investigation reveal that brand is a key factor for competition in the market for enteral nutrition products in France and Nestlé is the unavoidable supplier with must have brands in France. Indeed competitors unanimously responded that brand plays a significant role in the competitive process[39]. One competitor explained that "*brand is a key driver for prescriptions and is also essential for patient confidence*". Another competitor pointed out that practitioners would remember a limited number of brands.

72. Customers of the outpatient market (pharmacies, pharmaceutical wholesalers and homecare companies) also unanimously confirmed[40] that brand was an important criterion for their purchases of enteral nutrition products. Indeed, as explained by a customer, the brand gives to the customer guarantees about the quality and security of the products, which will ultimately be delivered to a patient for medical reasons. Based on the answers of hospitals in the market investigation brand would not appear to be one of the criteria used to select enteral nutrition products. However, these replies have to be examined in the light that purchases made by hospitals are often organised through tenders. In public tendering brand is excluded from the criteria on the basis of which bids can be assessed. Therefore replies received from hospitals must be interpreted with caution as regards brand value in the market for enteral nutrition products.

73. In assessing the effects of the planned transaction in France, it should be stressed that customers view the merging parties as *close competitors*. When asked whether there is an

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34 2006 data submitted by the notifying party in response to Commission's questions dated 24.05.2007.

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39 See replies of competitors to question 35 of questionnaire sent on 8.05.2007.

40 See replies of customers to question 34 of questionnaire sent on 10.05.2007.

unavoidable supplier of enteral nutrition products in France, all but one customers of the outpatient market named Nestlé. In addition, Novartis was the most frequent supplier named as the first alternative to Nestlé, and Nestlé was the first alternative named by most of the customers as a replacement to Novartis. The market respondents' views therefore confirm the closeness of competition between the parties' brands and products. Numico was the supplier most frequently referred to as an alternative supplier after the parties.

74. Post-merger, Numico would remain the only significant competitor in the French market, with market share of [20-30] % on the market for enteral products sold to hospitals and [20-30]% to the outpatient customers. The notifying party argues that the new entity will continue to face competition from other competitors, in particular Fresenius and Lactalis, which despite their small market shares would exert competitive pressure. However, market shares data over the last three years shows that the market positions of the smaller competitors have remained stable and below 5%. Indeed, despite their long term presence in France, these two companies have not been able to increase their market position. During the market investigation, both companies indicated that the combination of Nestlé and NMN activities in France would furthermore increase the barriers to expansion.

75. The notifying party argues that barriers to entry in the French market for enteral nutrition products are low and that there are numerous potential competitors. However this has not been confirmed by the market investigation. Indeed customers, both hospitals and outpatients, and competitors unanimously confirmed that they neither noticed any recent entry nor foresaw any new entry in the near future. Entry is rather difficult as shown by the example of Abbott, who according to the notifying party, albeit being very strong in some other EU markets, has several times unsuccessfully tried to enter the French market without successfully establishing itself as a main supplier. The notifying party submits that entry would be easy for dairy producers which use similar raw materials and names Lactalis as a good example of recent successful entrant in the market. Within the time perspective that the Commission can consider for assessing the effects of the merger new entry by dairy producers is not likely. As to the example mentioned, it should first be noted that Lactalis has not gained significant market share and second, it has entered the market through the acquisition of a company already active in this market, Celia.

76. The absence of recent new entrants and expansion on actual competitors demonstrate that, contrary to the notifying party's views, barriers to entry and to expansion are high in the French market for enteral nutrition products. In addition to barriers linked to new entry (setting up sales organisation etc.) the Commission has found that brand recognition is a major barrier also to expansion. Customers, both hospitals and general practitioners, who are the decision makers, appear to be conservative customers[41]. Therefore a new competitor would need to invest significant resources and time to establish its brand.

77. The market investigation also indicates that entry is easier for larger players[42], competitors explained that delivering a broad portfolio of products constitutes a high barrier to entry. The notifying party itself differentiates between the competition brought by large suppliers with broad portfolio and smaller suppliers only active in the supply of few enteral nutrition products and explains that while hospitals may select one or two large suppliers with a full product portfolio, "*smaller competitors will continue to compete in*

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41 In the notification, Nestlé submits that its contract renewal rate in France with hospitals was approximately [60-70]% in 2006.

42 See replies of competitors to question 39 of questionnaire sent on 8.05.2007.

such environment against the large suppliers for the lots where they have enteral healthcare nutrition products".[43] This casts doubts on the ability of smaller suppliers to act as a sufficient influence, as argued by the notifying party in the same submission.

78. Given the elements explained above; the high market shares that Nestlé would acquire with only one strong competitor remaining (who might find it profitable to follow price increases of the leading player), the closeness of competition and high barriers to entry and expansion, the Commission considers that the transaction may give rise to non-coordinated effects in the French markets for enteral nutrition products to the hospital channel and to the outpatient channel post-transaction. Therefore, the proposed transaction raises serious doubts as to its compatibility with the common market and the EEA agreement.

2. Vertical relationship

79. Nestlé and NMN supply enteral healthcare nutrition products to homecare customers and Nestlé is active downstream in the supply of homecare health nutrition services in Francewhich the notifying party submits is the relevant market for the purpose of the assessment of this case. Homecare health nutrition services consist in the provision and delivery in the patient's home of materials and nutrients required by a patient.

80. As described above, the combined entity would have a market share of [50-60]% of the upstream market for the supply of enteral healthcare nutrition products to outpatient customers. On the downstream market for the supply of homecare health nutrition services, Nestlé is the number two player with a market share of [10-20]%. The market leader is Air Liquide with a market share of [20-30]% and other competitors include SNADOM ([10-20]%), LVL Médical ([10-20]%) as well as some smaller players (Bastide, Locapharm, Caléa, Antadir).

81. The transaction will not bring about any new vertical integration as Nestlé is already active pre-merger in the supply of homecare services in France. The change brought about by the transaction is the increased market position of the combined entity in the upstream market of supply of enteral products. The competitors in the downstream market, who distribute enteral nutrition products of all suppliers to out patients, would find that a larger part of their sourcing is dependent on one of their competitors.

82. As to the incentives and ability of Nestlé to raise its rivals costs in the downstream market the particular circumstances of healthcare nutrition markets must be taken into account. In principle, downstream homecare companies which purchase enteral nutrition products could switch to alternative sources of supply and it would not be profitable for Nestlé to risk sales to third party homecare services companies which represent [80-90]% of the demand of the homecare segment. However, switching is limited by the fact that patients will have prescriptions for a specific enteral nutrition product.

83. During the market investigation, homecare companies expressed their concerns that the new entity, by increasing its share in the supply of enteral nutrition products, may decide to raise the price it charges in supplying its competitors in the homecare market. Indeed, as explained in the previous section, the increased market power of the combined entity created by the transaction may give rise to a price increase and raise rivals costs in the

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[43] See notifying party's submission on 19.06.2007 "France".

downstream market as switching to alternative products is difficult. Thus the Commission considers that the transaction may give rise to input foreclosure in the downstream market of homecare health nutrition services in France. Therefore, the proposed transaction raises serious doubts as to its compatibility with the common market and the EEA agreement.

B. Spanish markets for enteral nutrition products

84. In the EEA, Spain is one of the fastest growing markets as regards enteral nutrition products. It has shown significant growth in the last years (9% between 2004 and 2005 and 13.5% between 2005 and 2006) and the parties expect the growth rate to be [10-15]% on average until 2011. Three quarters of the sales are directed to the out patient market (only pharmacies as the home care channel does not exist in Spain), sales to hospitals accounting fro the remaining quarter.

85. Spain is characterized by very high prices of enteral products, almost twice the average price in the EEA. In value, Spain is the third market in the EEA, behind the UK and Germany. According to Nestlé, the higher prices in Spain are explained by the acceptance of the Spanish health authorities to reimburse high prices for enteral nutrition products. It is also argued that costs of supply are high due to marketing and sales force costs required to reach a large number of customers since the out patient market is significant. The notifying party contends that prices in Spain will decrease, in the near future, towards the European average, in the light of the new regulations adopted by Spanish authorities as regards the reimbursement system for enteral nutrition products (see below).

Position of Nestlé, NMN and their competitors

86. During the market investigation, the Commission found that the market shares of the merging parties were underestimated. Three of the competitors identified by the notifying party on the Spanish market for enteral nutrition products informed the Commission that they do not sell enteral nutrition products in Spain. These companies are Madaus ([5-10]% market share according to the notifying party's estimate), Merck ([0-5]% market share) and Arkochim ([0-5]% market share).

87. It should also be noted, that in internal documents submitted by NMN in the course of the investigation, it appears that NMN estimates its market share in Spain significantly higher in 2003 and 2005 than the shares provided in the notification[44]. In the notification, Nestlé indicated that the market share of NMN for enteral nutrition products in Spain was [30-40]% in 2004, 2005 and 2006 compared to [40-50] % in the internal documents of NMN. In the internal business plans of NMN for Spain, only Abbott, Numico, Nestlé and Vegenat are mentioned by NMN as competitors.

[44] See "Financial Figures target 2006 Iberia September 14 2005" and "Pre-target 2004 Medical Nutrition Iberia September 3 2003" submitted by Novartis in response to Commission's questions dated 24.05.2007. No data for 2004 are available in Novartis' internal documents

88. The notifying party explains the different estimates by its interpretation of the scope of healthcare nutrition products. In the notification it has included in the Spanish enteral nutrition market anti-obesity nutrition products sold by Arkochim, Vegenat and Merck which allegedly compete directly with anti-obesity products supplied by NMN in Spain: *Optisource*, *Optifast Bars* and *Optifast Powder* As regards Madaus, this company provides fibre supplementation products "*Plantaben*" and *Cenat* which would compete directly with NMN product *Resource Benefiber Powder*. It is common ground that neither Arkochim nor Madaus or Merck compete in other segments of healthcare nutrition (tube-feeding products or specialty products). As regards the internal market share in the plan, the notifying party explained that NMN use global business plans templates which focus on key areas of the business. Obesity and fibre supplementation products are not a global priority of NMN and this is the reason why they are not included in NMN business plans.

89. As a preliminary remark, it can be noted that the business plans provided by NMN are specifically drawn up for the Spanish market, which is considered by NMN as a […]. NMN submitted that in Spain, anti-obesity and fibre supplementation products are well-established segments in which NMN actively competes. However, if these categories are important to assess the business prospects and competition in Spain in the enteral nutrition market, it is surprising that they are not mentioned in NMN own business plans for Spain and these explanations are far from convincing.

90. During the market investigation, the Commission has sought to verify whether anti-obesity products sold by Merck, Arkochim and Vegenat and fibre supplementation products supplied by Madaus are considered as "Dietary Foods for Special Medical Purposes" and therefore have to comply with the labelling requirements and regulations foreseen by the FSMP directive. As regards anti-obesity products, only *Vegefast Complete* sold by Vegenat is a FSMP product. In thefibre supplementation area, Madaus' products are regulated as pharmaceuticals and are not considered as FSMP products.

91. In the light of the above, the Commission considers that Madaus, Merck and Arkochim do not compete with the parties in the market for enteral nutrition products (with the possible exception of Vegefast complete). Therefore, the Commission has calculated market shares of the parties and their competitors as set in the grey columns in the table below.

Sales in Spain, 2006	Total enteral sold through all channels (parties' estimates)		**Market reconstruction Total enteral sold through hospitals**	**Market reconstruction Total enteral sold through pharmacies**	**Market Reconstruction Total enteral sold through all channels**
	K€	%	%	%	K€
Nestlé	[5-20.000]	[0-5]%	[5-10]%	[5-10]%	[5-10]%
NMN	[65-80.000]	[30-40]%	[35-45]%	[35-45]%	[35-45]%
Combined	**[75-90.000]**	**[40-50]%**	**[45-55]%**	**[50-60]%**	**[45-55]%**
Numico	[30-45.000]	[10-20]%	[15-25]%	[15-25]%	[15-25]%
Abbott	[30-45.000]	[10-20]%	[15-25]%	[20-30]%	[20-30]%
Vegenat	[0-10.000]	[0-5]%	[5-10]%	[0-5]%	[0-5]%
Grifols	[0-10.000]	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Fresenius			[0-5]%	0%	0%
Madaus	[5-20.000]	[5-10]%	0%	0%	0%
Merck	[0-10.000]	[0-5]%	0%	0%	0%
Arkochim	[0-10.000]	[0-5]%	0%	0%	0%
Others	[10-25.000]	[5-10]%	0%	0%	0%
TOTAL(k€)	**[195-210.000]**				

Competitive assessment

92. All channels considered, prior to the merger, NMN was the clear market leader for enteral nutrition in Spain, with a market twice as high as its nearest competitors Abbott and Numico. Nestle is number four with a [5-10]% market shares. Other players in the market include local companies Vegenat and Grifols, which achieve most of their sales in the hospital channel. Although very present in the EEA as a whole and in neighbouring countries (number two in Portugal with an estimated market share of [20-30]%), the German company Fresenius is virtually non active in Spain.

93. The transaction will reinforce the market position of NMN and post-merger the new entity will reach combined shares of [45-55]% all channels considered. This market share will be slightly higher in the outpatient (pharmacies) channel, which represent in Spain three quarters of the sales.

94. The notifying party argues that this increment can be considered as insignificant, that Nestlé is only one of a number of the smaller suppliers that are active in Spain and that the transaction will not eliminate a competitive constraint in the market place. Although the

increment can appear as relatively small, the Commission has taken the view that the competitive force that Nestlé has represented in the Spanish market is not fully captured by its market shares alone and that the removal of this force could lead to anti-competitive effects. In this context, it should be reiterated that the general price level for healthcare nutrition products in Spain is very high which reinforces the need to carefully investigate any lessening of effective competition in this market.

95. The market investigation and internal documents from the notifying party[45] have revealed that Nestlé has entered the Spanish market in 2001 with its brand Clinutren. In order to be successful, Nestlé implemented a differentiation strategy based on its thorough knowledge of the food sector: It focused on the oral supplementation business (sip-feeding) in the pharmacies and developed new tastes and flavours, which according to Nestlé had been neglected by its well-established competitors in the previous years.

96. In order to achieve large volumes, Nestlé had to compete fiercely on prices in the Spanish market. This price competition has been acknowledged by NMN […][46]. One of the main competitors of Nestlé and NMN has confirmed that Nestlé competed aggressively in the Spanish market between 2001 and 2006 with low prices and high discounts.

97. This strategy was successful for the notifying party. Between 2001 and 2006 Nestlé gained a market share of [5-10]%. It doubled its sales in the outpatient channel and increased it by [70-80]% in the hospital channel. As mentioned above, Spain is characterized by a double digit growth of the market for enteral nutrition products. But it is worth noting that NMN sales' growth has been lower than market growth during the same period: NMN sales rose by [10-20]% in the inpatient channel (+[20-30]% for the whole market) and [20-30]% in the inpatient channel (+ [30-40]% for the whole market). It follows from the above that Nestlé has gained market shares of NMN.

98. As in France, brands play an important role in the competitive process and all competitors mentioned unanimously that brand was important since these products are still relatively new and brands are a key element for patient confidence. In that regard, it appears that the new entity will hold four of the five most successful brands in the Spanish enteral nutrition market: *Resource*, *Isosource*, *Novasource* (NMN) and *Clinutren* (Nestlé) will compete with *Nutrison*. Although Nestlé has a limited market share, one of its brands is number five in the market, which shows that Nestlé's strategy since its recent entry has been undoubtedly successful.

99. Apart from Nestlé, competitors and customers unanimously confirmed that they neither noticed any recent entry in the Spanish market for enteral nutrition products nor foresaw new entries in the near future. As in France, respondents to the market investigation indicated that there are a number of barriers to entry, including brand recognition and access to practitioners. Investments to enter a national market like Spain on a sufficient scale are estimated by competitors to amount to at least €25 million over a period of five years. Nestle indicated[47] that the cost of establishing a sales force covering the whole of Spain was approximately € [1-5] million. These costs do not include the marketing costs

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47 Form CO, page 113.

necessary to enter a national market and have access to decision-makers: leaflets, participation in congresses, visits to doctors etc.

100. The notifying party claims that Nestlé and NMN' customers being large hospitals and large pharmacies/wholesalers have high countervailing buyer power which would limit the possibility of the merged entity to increase prices. Without accepting the argument of countervailing power, on the basis of all the elements gathered and the responses in the market investigation, it appears that competition concerns may be less pronounced in the inpatient market.

101. First, in the market for enteral products sold to the hospitals, the use of tender proceedings in combination with the number of remaining players must be considered. In contrast to France, there will remain two sizeable competitors, Abbott and Numico, which would have the possibility to reply on call for bids thereby exercising competitive pressure on the new entity. Second, as explained above, Nestlé in Spain focused its strategy on oral supplementation products sold in pharmacies. Considering these specific strengths of Nestlé as competitor in the Spanish market and the responses in the market investigation, the removal of Nestlé as competitor in the hospital channel may not lead to strong competition concerns.

102. In the market for enteral products sold to the pharmacies, there are no tenders and customers are supplied to orders. Wholesalers have unanimously confirmed that they were dependent on the demand of pharmacies, which have to follow the prescription of general practitioners. In this situation, wholesalers and pharmacies have very few possibilities of changing suppliers and half of respondents to the market investigation in this channel have indicated that they fear a price increase post-merger. As in France, the direct link between the markets for hospitals and for outpatients is limited.

103. As mentioned above, Spain is a market with structurally high prices of enteral nutrition products, almost twice as high as in other EEA countries. In a meeting with the Commission, the notifying party have indicated that this situation is linked to the procedure chosen by the Spanish health authorities: In Spain, the healthcare nutrition manufacturer proposes the reimbursement price and on a general basis, the proposal is approved by Health authorities. The notifying party has submitted data[48] showing that while prices of the same products have fallen in the UK, Germany or France between 2004 and 2006, they have increased in Spain.

104. At wholesale level in the outpatient channel, reimbursement prices serve as the starting point for the pricing to the pharmacist/wholesaler as it is assumed that the customer normally will not pay more for the product than what is reimbursed. In the hospital channel, prices are not linked to the reimbursement prices set out by health national authorities.

105. The notifying party submits that the prices are expected to decrease in the future considering that Spain has adopted a new law as regards the reimbursement system for enteral nutrition products[49]. All companies have submitted in April 2007 an application for their products to the health authorities. These applications contain clinical data in order to prove the quality of these products, in particular speciality products. Products

48 Notification, annex 7.8.2.

49 These are Real Decreto 1030/2006 of 15 september 2006 and Orden SCO/3858/2006 of 5 december 2006

will be placed in new categories according to their caloric and protein content. Some will no longer be reimbursed and others that have not reimbursed so far may become reimbursable. Results should be communicated to companies by Spanish Health authorities in October or November 2007. The parties contend that these new regulations will put downward pressure on prices and will push these prices towards EU average. Nestlé has not submitted any data to support its views.

106. The Commission has sought to verify the likely effects of the changes to the Spanish reimbursement system, but the impact is quite difficult to predict. One competitor has explained that they have been working on different scenarios of "de-listing" of their products and that all of these scenarios can be envisaged considering that the law leaves room for interpretation. Furthermore, the Spanish health ministry, contacted during the course of the market investigation, has not been able to confirm the impact that the new rules will have on the level of prices in Spain.

107. Given the specific circumstances of the Spanish healthcare nutrition market with structurally high prices and the role that Nestlé has played as a newcomer in this market, the removal of a significant competitive pressure on the market leader NMN may give rise to non-coordinated effects in the out patient market. Therefore, the proposed transaction raises serious doubts as to its compatibility with the common market and the EEA agreement in Spain.

C. Market for medical devices

108. As regards the market for the sale of medical devices for enteral healthcare nutrition, the new entity would have combined market shares of [10-20]% at worldwide level (Nestlé, [0-5]%; NMN, [10-20]%) and [10-20]% in the EEA (Nestlé, [0-5]%; NMN, [10-20]%). On a national basis, the transaction would lead to affected markets in France (Nestlé, [0-10]%; NMN, [0-10]%) and Germany (Nestlé, [0-5]%; NMN, [10-20]%) which are the only Member States where Nestlé is active in the sale of medical devices.

109. In view of the absence of concerns raised by the market investigation, the fact that there will remain strong competitors such as Fresenius ([20-30]% at EEA level), Numico ([20-30]% at EEA level) and Abbott ([10-20]% at EEA level) and the fact that the parties do not produce these medical devices themselves but source them from third party manufacturers including Fresenius, the Commission is of the view that, the proposed transaction is unlikely to raise competition concerns on these markets on any assumption of the relevant geographic market.

VI. REMEDIES

A. Procedure

110. As explained in the Commission Notice on remedies[50], where a concentration raises serious doubts about its compatibility with the common market, the parties may seek to modify the concentration in order to resolve the competition concerns identified by the Commission. In assessing whether or not the remedy will restore effective competition,

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[50] Commission Notice on remedies acceptable under Council Regulation (EEC° No 4064/89 and under Commission Regulation (EC) No 447/98.

the Commission considers the type, scale and scope of the remedies by reference to the structure of and particular characteristics of the markets in which competition concerns arise. In so doing, the Commission has to assess both, (i) the independence, the viability and the competitiveness of the divested business on the long term and (ii) the effectiveness of the proposed remedy in removing the competition concerns. In order to carry out this assessment, the Commission may seek the views of competitors and customers on the relevant markets.

111. The parties submitted remedies on 8 June 2006 and a slightly revised version on 25 June 2006, taking into account of concerns that the Commission raised as a result of the market test of the first set of remedies.

B. Description of the remedies

112. In order to remove the competition concerns described above the parties committed to divest the entire healthcare nutrition business of NMN in France (apart from the "*Impact*" product which will be replaced by the *Crucial* products currently sold by the healthcare nutrition business of Nestlé in France) and the entire healthcare nutrition business of Nestlé in Spain.

113. The divestment businesses will include the following assets:

- in relation to NMN business in France, the transfer of the shares of the stand-alone NMN healthcare nutrition business, Novartis Nutrition S.A.S. together with all its associated assets, i.e. tangible assets, licences, permits, authorisations, contracts, leases, commitments, customer orders, customer records and personnel, and the licence of certain intellectual property rights (in particular the brands) for use only in France (other than assets relating to the Impact trademark and products). In addition, Nestlé will license the intellectual property rights (in particular the brands) related to Crucial for use in France;
- in relation to Nestlé's healthcare nutrition business in Spain, the transfer of all the tangible assets, licences, permits, authorisations, contracts, leases, commitments, customer orders, customer records and personnel, and the licence of certain intellectual property rights (in particular the brands) for use only in Spain;
- an exclusive license for the trademarks for a period of 5 years. The intention is that the Purchasers will re-brand the products to be transferred for use in France and Spain respectively within this period of 5 years. After this period, neither Nestlé nor the Purchaser will be allowed to use the trademarks in France and Spain respectively for a further period of 5 years;
- the transfer of employees, and in particular of all personnel with product and customer-base knowledge for France and Spain respectively including both key personnel as well as the sales forces. For France this amounts to approximately […] personnel and for Spain to approximately […] personnel.
- in relation to production, as product manufacturing is organized centrally by both Nestlé and NMN respectively, transitional supply agreements between the purchaser and Nestlé for up to 3 years and if so requested by the Purchaser(s) to make best efforts to transfer the benefits of the existing third party arrangements with co-manufacturers;
- an exclusive license for […] for patents, trade secrets and other know-how, which thereafter will become non-exclusive license […];

- licenses for existing pipeline products that are planned to be launched in France or Spain respectively in […]. As product research and development work (R&D) is carried out centrally by Nestlé and Novartis respectively (or through their respective co-manufacturers), at the option of the purchaser, R&D support for 12 months in relation to the pipeline products;
- a license for 12 months in relation to the Nestlé and Novartis company name and associated trademarks after closing of the acquisition of the NMN business from Novartis;
- optionally, a transitional services agreement for up to one year after closing of the acquisition of the NMN business from Novartis.

C. Assessment of the remedies

1. French markets for enteral nutrition products and homecare health nutrition services

114. The Commission market tested the proposed remedies in relation to the markets for enteral nutrition products to the hospital channel and to the outpatient channel in France as well as the homecare health nutrition services. The vast majority of respondents to the market test considered that the proposed remedies solve the competition concerns identified by the Commission. The proposed remedies would indeed entirely remove the overlap between the parties' activities in the markets for enteral nutrition products and resolve competition concerns in the homecare health nutrition services market.

115. As regards the transfer of the divested business, most respondents took the view that the transfer of Novartis healthcare business including its brands is not likely to raise particular difficulties in particular if the purchaser is already active in the healthcare sector. In addition, all French customers who responded in the market test confirmed that they would continue to purchase from the acquirer of the French business and brands, as long as the quality and security of the products were preserved.

116. A 5 years period of exclusive license of the trademarks and the black out period of 5 years during which neither Nestlé nor the purchaser will be allowed to use the brands were considered by the majority of respondents as sufficient for the purchaser to re-brand the products and migrate to its own brands,

117. Most respondents to the market test considered that the duration of the transitional supply agreements (3 years) was appropriate. Respondents have also considered that the provisions regarding the exclusive license for […] for patents, trade secrets and other know-how as well as the license for 12 months in relation to the Nestlé and Novartis company name are sufficient and adequate to guarantee a smooth and efficient transfer of the divested business.

118. In France, the commitment excludes the NMN brand *Impact* which is replaced by the Nestlé brand *Crucial*. During the market test, while French customers generally confirmed that the two brands have broadly the same composition and same medical indications and therefore that they would purchase *Crucial* instead of *Impact*, some competitors indicated that the exclusion of *Impact* would put the divested business at risk as its replacement by *Crucial* would be difficult due to the risk of customers' confusion and the fact that *Impact* was a key product in the NMN brands portfolio, which was generating high profits and was acting as a "door opener".

119. The Commission carefully considered the elements raised by the market test concerning the non-inclusion of the *Impact* brand in the remedy package. However, on the basis of additional information submitted by the notifying party and due to very specific circumstances of this case, the Commission has come to the conclusion that the substitution of *Impact* by *Crucial* will not reduce the divested business viability nor undermine its implementation.

120. As shown in the table below, *Impact* sales in France are rather limited compared to the other NMN brands ([1-5%] of total NMN sales) and the notifying party submits that the same holds true for the profit contribution of *Impact* ([below 5%]).

Brand	NMN sales in France, 2006	
	K€	%
Impact	[100-1.000]	[1-5]%
Isosource	[1.000-5.000]	[5-10]%
Novasource	[5-10.000]	[10-20]%
Resource	[20-30.000]	[70-80]%
Total	[30-45.000]	

121. When compared to *Crucial*, *Impact* sales are showing a much smaller growth rate. Indeed, *Crucial* was launched in 2001 and achieves today higher sales in hospitals than *Impact*[51] (*Crucial*: €[100.000-1.000.000]; *Impact*: €[100.000-1.000.000]). *Crucial*'s sales increased by more than [50-150]% between 2004 and 2006 and are still growing strongly by [10-50]% compared to [5-30]% for Impact. These figures clearly dismiss doubts raised third party concerning the importance of the contribution brought by *Impact* to the NMN business in France and show that in terms of quantitative impact, *Crucial* is a good substitute.

122. In terms of product substitution, the notifying party submits that both products are nutritionally complete enteral healthcare nutrition products used in the segment of immuno-nutrition and have the same target patient group, the hypermetabolic critically ill patient in hospitals (i.e. patients post surgery). Furthermore both *Impact* and *Crucial* are indicated for the same clinical conditions, namely hypermetabolically stress patient, trauma, burns, ventilator dependant, immune suppressed and major surgery. While the notifying party acknowledges that *Impact* is the most clinically proven product, it submits that *Crucial* is also supported by highly respected published clinical data, as demonstrated by its commercial success in hospitals.

123. As regards the role of *Impact* as a "door opener", mentioned by some respondents in the market test, the notifying party submits that, as *Impact* achieves only low sales, it is never considered by NMN as a key initial target area when developing a new relationship with hospital. In addition, as discussed above, *Crucial* achieves similar sales and higher growth. Therefore there is no evidence that *Crucial* would not be better placed than *Impact* to play the role of a door opener.

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51 *Impact* was launched in France more than 10 years ago.

124. Finally, as regards the risk of confusion in the sales of *Crucial* instead of *Impact*, the notifying party explains first that it is customary in the industry that salespeople change employers and are hired by competitors, as demonstrated by the recent recruitment by Fresenius of NMN sales representatives. Second, sales representatives are all trained not only on the products of their employers but also on the competing products. As the two products are the only products sold for immuno-nutrition in France, both are well known by Nestlé and NMN sales representatives. Last, the notifying party submits that the brand swap will affect Nestlé as well, and should the confusion happen, this will affect both suppliers.

125. Therefore, for the reasons detailed above and on the basis of the specific circumstances of the present case, the Commission is of the view that the substitution of Impact by Crucial in the portfolio of the divested business is acceptable.

126. Overall, the divested business is also considered as a viable business by the majority of respondents and it is expected that the purchaser of the divested business will become an independent competitive force on the market after the end of the transitional period.

127. The Commission is of the view that the proposed remedies are suitable to address the main factors that lead to competition concerns and allow the Purchaser to restore effective competition. Brands are a key entry barrier in the healthcare nutrition business and the brands included in the remedies are well-known and achieve significant sales and should guarantee that the Purchaser can establish itself as an efficient competitor in the French markets of enteral nutrition products to hospitals and the outpatient channel.

128. On the basis of the foregoing, the Commission has concluded that the proposed remedies are sufficient to remove the serious doubts as regards of the markets for enteral nutrition products to hospitals and to the outpatient channel and for homecare health nutrition services in France.

2. Spanish markets for enteral nutrition products

129. The Commission market tested the proposed remedies in relation to the markets for enteral nutrition products to the hospital channel and to the outpatient channel in Spain. The vast majority of respondents to the market test considered that the proposed remedies solve the competition concerns identified by the Commission. The proposed remedies would indeed entirely remove the overlap between the parties' activities.

130. The remedies in Spain consist in the divestiture of the entire healthcare nutrition business of Nestlé in Spain, which operates under two main brands, Clinutren ([…]% of total Nestlé sales in Spain) and Sondalis ([…]% of total sales).52. As described in the previous section, the remedies include the transfer of similar tangible and intangible assets as those transferred in France under the same conditions, in particular as regards duration of licenses of trademarks, patents and company's name and production arrangements.

131. As explained in the assessment of the remedies for France and for the same reasons, the market test was overall positive as regards the viability of the divested business. While Nestlé's business in the enteral healthcare nutrition markets in Spain is of smaller size than the divested business in France53, none of the market respondents suggested that it may

52 Nestlé also achieves minor sales under the brands *Peptamen* and *Modulen*.

53 Nestlé achieved sales of € […] of enteral nutrition products in Spain in 2006.

undermine the viability of the divested business. Indeed, Nestlé has been successful in developing its brands in the Spanish markets and exerts significant competitive pressure.

132. On the basis of the foregoing, the Commission has concluded that the proposed remedies are sufficient to remove the serious doubts as regards sales of enteral nutrition products to hospitals and to the outpatient channel in Spain.

D. Conditions and obligations

133. Pursuant to the second paragraph of Article 6(2) of the Merger Regulation, the Commission may attach to its decision, conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

134. The achievement of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the common market no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(5) of the Merger Regulation.

135. The remaining requirements set out in the other Sections of the Commitments submitted by the parties on 25.06.2007 are considered to constitute obligations.

136. In accordance with the basic distinction described above, the decision in this case is conditional upon the full compliance with Sections B to D of this Decision and the schedule of the Commitments submitted by the parties on 25.06.2007.

VII. CONCLUSION

137. The Commission has concluded that the remedies submitted by the Parties are sufficient to remove the serious doubts raised by the concentration. Accordingly, subject to the full compliance with the commitments submitted by the Parties the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) and Article 6(2) of Council Regulation (EC) No 139/2004.

138. The detailed text of the commitments is annexed to this decision. The full text of the annexed commitments forms an integral part to this decision.

For the Commission

(signed)

Neelie KROES
Member of the Commission

NESTLÉ / NOVARTIS MEDICAL NUTRITION
CASE No. COMP/M.4540

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EC) No. 139/2004 (the "***Merger Regulation***"), Nestlé S.A. and Novartis AG (the "***Parties***") hereby provide the following Commitments (the "***Commitments***") in order to enable the European Commission (the "***Commission***") to declare the Notified Concentration (as defined herein) compatible with the common market and the EEA Agreement by its decision pursuant to Article 6(1)(b) of the Merger Regulation (the "***Decision***").

These Commitments are given by the Parties without prejudice to their position that the Notified Concentration does not significantly impede effective competition within the common market or a substantial part of it, whether by the creation or strengthening of a dominant position or otherwise, and is therefore compatible with the common market and the functioning of the EEA Agreement.

The Commitments shall take effect upon the date of adoption of the Decision.

This text shall be interpreted in the light of the Decision to the extent that the Commitments are attached as conditions and obligations, in the general framework of Community law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98.

Section A. Definitions

For the purpose of the Commitments, the following terms shall have the following meaning:

Affiliated Undertakings: undertakings controlled by the Parties and/or by the ultimate parents of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 Merger Regulation and in the light of the Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89.

Closing: the transfer of the legal title of the Divestment Businesses to the Purchaser(s).

Divestment Businesses: the businesses as defined in Section B and the Schedule that the Parties commit to divest.

Divestiture Trustee: one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by Nestlé and who has received from Nestlé the exclusive Trustee Mandate to sell either or both of the Divestment Businesses to a Purchaser(s) at no minimum price.

Effective Date: the date of adoption of the Decision.

First Divestiture Period: the period of […] months from the Effective Date.

Enteral Healthcare Nutrition Products: All products covered by the Commission Directive "1999/21/EC of 25 March 1999 on Dietary Foods for Special Medical Purposes" (hereinafter referred to as ***FSMP Directive***) which defines enteral healthcare nutrition products in Art. 1(2), first sentence, as follows: *"Dietary foods for special medical purposes*

means a category of foods for particular nutritional uses specially processed or formulated and intended for the dietary management of patients and to be used under medical supervision." For the avoidance of doubt, this definition shall include all products currently sold by Nestlé Healthcare Nutrition and Novartis Medical Nutrition (as described in detail to the Commission in the Form CO).

Hold Separate Managers: the persons employed by the Divestment Businesses to manage the day-to-day business under the supervision of the Monitoring Trustee.

Key Personnel: all personnel necessary to maintain the viability and competitiveness of the Divestment Businesses, as listed in the Schedule.

Monitoring Trustee: one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by Nestlé, and who has the duty to monitor the Parties' compliance with the conditions and obligations attached to the Decision.

Nestlé: Nestlé S.A., incorporated under the laws of Switzerland, with its registered office at Avenue Nestlé 55, CH-1800 Vevey, Switzerland and registered with the Commercial/Company Register at Registre du Commerce du Canton de Vaud under number CH-550-0067293-5.

Notified Concentration: the proposed acquisition by Nestlé of the healthcare nutrition business of Novartis, which was notified to the Commission on 7 May 2007.

Novartis: Novartis AG, incorporated under the laws of Switzerland, with its registered office at Lichtstrasse 35, 4056 Basel and registered with the Commercial/Company Register of the canton of Basel under number CH–270.3.002.061-2.

Personnel: all personnel currently employed by the Divestment Businesses, including Key Personnel, staff seconded to the Divestment Businesses, shared personnel and the additional personnel listed in the Schedule.

Purchaser(s): the entity or entities approved by the Commission as acquirer(s) of the Divestment Businesses in accordance with the criteria set out in Section D.

Trustee(s): the Monitoring Trustee and the Divestiture Trustee.

Trustee Divestiture Period: the period of […] months from the end of the First Divestiture Period.

Section B. The Divestment Businesses

Commitment to divest

1. In order to restore effective competition, the Parties commit to divest, or procure the divestiture of the Divestment Businesses by the end of the Trustee Divestiture Period as a going concern to a Purchaser(s) and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 16. To carry out the divestiture, Nestlé commits to find a Purchaser(s) and to enter into a final binding sale and purchase agreement(s) for the sale of the Divestment Businesses within the First Divestiture Period. If Nestlé has not entered into such an agreement at the end of the First Divestiture Period, Nestlé shall grant the Divestiture Trustee

an exclusive mandate to sell the Divestment Businesses in accordance with the procedure described in paragraph 25 in the Trustee Divestiture Period.

2. The Parties shall be deemed to have complied with this commitment if, by the end of the Trustee Divestiture Period, Nestlé has entered into a final binding sale and purchase agreement, if the Commission approves the purchaser(s) and the terms in accordance with the procedure described in paragraph 16 and if the closing of the sale of the Divestment Businesses takes place within a period not exceeding […] after the approval of the purchaser(s) and the terms of sale by the Commission.

3. In order to maintain the structural effect of the Commitments, the Parties shall, for a period of […]after the Effective Date, not acquire direct or indirect influence over the whole or part of the Divestment Businesses, unless the Commission has previously found that the structure of the market has changed to such an extent that the absence of influence over the Divestment Businesses is no longer necessary to render the proposed concentration compatible with the common market.

Structure and definition of the Divestment Businesses

4. The Divestment Businesses consist of the entire healthcare nutrition business of Novartis in France (apart from the "Impact" products), the Crucial products sold by the healthcare nutrition business of Nestlé in France (the ***French Divestment Business***) and the entire healthcare nutrition business of Nestlé in Spain (the ***Spanish Divestment Business***). The present legal and functional structure of the Divestment Businesses as operated to date is described in more detail in the **Schedule** and the Annexes to the Schedule.

5. Nestlé undertakes for a period of 5 years after the end of the exclusive trade-mark license not to sell to customers located in France Enteral Healthcare Nutrition Products under the trade-marks licensed to the Purchaser of the French Divestment Business.

6. Nestlé undertakes for a period of 5 years after the end of the exclusive trade-mark license not to sell to customers located in Spain Enteral Healthcare Nutrition Products under the trade-marks licensed to the Purchaser of the Spanish Divestment Business.

Section C. Related commitments

Preservation of Viability, Marketability and Competitiveness

7. From the Effective Date until Closing, Nestlé shall preserve the economic viability, marketability and competitiveness of their respective parts of the Divestment Businesses, in accordance with good business practice, and shall minimize as far as possible any risk of loss of competitive potential of the Divestment Businesses. In particular Nestlé undertakes:

   (a) not to carry out any act upon their own authority that might have a significant adverse impact on the value, management or competitiveness of the Divestment Businesses or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Businesses;

(b) to make available sufficient resources for the development of the Divestment Businesses, on the basis and continuation of the existing business plans;

(c) to take all reasonable steps, including appropriate incentive/retention schemes (based on industry practice), to encourage all Key Personnel to remain with the Divestment Businesses.

Hold-separate obligations of Parties

8. Nestlé commits, from the Effective Date until Closing, to keep the Divestment Business separate from its other retained businesses and to ensure that Key Personnel of the Divestment Businesses – including the Hold Separate Managers – have no involvement in any business retained by Nestlé and vice versa. Nestlé shall also ensure that the Personnel do not report to any individual outside the Divestment Businesses.

9. Until Closing, Nestlé shall assist the Monitoring Trustee in ensuring that the Divestment Businesses are managed as a distinct and saleable entity separate from the businesses to be retained by Nestlé. Nestlé shall appoint Hold Separate Managers who shall be responsible for the management of the Divestment Businesses, under the supervision of the Monitoring Trustee. The Hold Separate Managers shall manage the Divestment Businesses independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by Nestlé.

To ensure that the Divestment Businesses are held and managed as a separate entity the Monitoring Trustee shall exercise Nestlé's rights as shareholder in the Divestment Businesses (except for its rights for dividends that are due before Closing), with the aim of acting in the best interest of the business, determined on a stand-alone basis, as an independent financial investor, and with a view to fulfilling Nestlé's obligations under the Commitments. Furthermore, the Monitoring Trustee shall have the power to replace members of the supervisory board or non-executive directors of the board of directors, who have been appointed on behalf of Nestlé. Upon request of the Monitoring Trustee, Nestlé shall resign as member of the boards or shall cause such members of the boards to resign.

Ring-fencing

10. Nestlé shall implement all necessary measures to ensure that Nestlé does not after the Effective Date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Businesses. In particular, the participation of the Divestment Businesses in a central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Businesses. Nestlé may obtain information relating to the Divestment Businesses which is reasonably necessary for the divestiture of the Divestment Businesses or whose disclosure to Nestlé is required by law.

Non-solicitation clause

11. The parties undertake, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel transferred with the Divestment Businesses for a period of 2 years after Closing.

Due Diligence

12. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Businesses, Nestlé shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:

    (a) provide to potential purchasers sufficient information as regards the Divestment Businesses; and

    (b) provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.

Reporting

13. Nestlé shall submit written reports in English on potential purchasers of the Divestment Businesses and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request).

14. Nestlé shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of an information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

Section D. The Purchaser

15. In order to ensure the immediate restoration of effective competition, the purchaser(s), in order to be approved by the Commission, must:

    (a) be independent of and unconnected to the Parties;

    (b) have the financial and other necessary resources (e.g. R&D), proven expertise and incentive to maintain and develop the Divestment Businesses as a viable and active competitive force in competition with the Parties and other competitors;

    (c) neither be likely to create, in the light of the information available to the Commission, prima facie competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Businesses (the before-mentioned criteria for the purchaser hereafter the "Purchaser Requirements").

16. The final binding sale and purchase agreement shall be conditional on the Commission's approval. When Nestlé has reached an agreement with a purchaser(s), the Parties shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), to the Commission and the Monitoring Trustee. The

Parties must be able to demonstrate to the Commission that the purchaser(s) meets the Purchaser Requirements and that the Divestment Businesses is being sold in a manner consistent with the Commitments. For the approval, the Commission shall verify that the purchaser(s) fulfils the Purchaser Requirements and that the Divestment Businesses is being sold in a manner consistent with the Commitments. The Commission may approve the sale of the Divestment Businesses without one or more Assets or parts of the Personnel, if this does not affect the viability and competitiveness of the Divestment Businesses after the sale, taking account of the proposed purchaser(s). The employee consultation process will be respected.

Section E. Trustee

I. Appointment Procedure

17. Nestlé shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee. If Nestlé has not entered into a binding sales and purchase agreement one month before the end of the First Divestiture Period or if the Commission has rejected a purchaser(s) proposed by Nestlé at that time or thereafter, Nestlé shall appoint a Divestiture Trustee to carry out the functions specified in the Commitments for a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.

18. The Trustee shall be independent of the Parties, possess the necessary qualifications to carry out its mandate, for example as an investment bank or consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Trustee shall be remunerated by Nestlé in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Businesses, the fee shall also be linked to a divestiture within the Trustee Divestiture Period.

Proposal by the Parties

19. No later than one week after the Effective Date, Nestlé shall submit a list of one or more persons whom Nestlé proposes to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the First Divestiture Period, Nestlé shall submit a list of one or more persons whom Nestlé proposes to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in paragraph 18 and shall include:

    (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;

    (b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks;

    (c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

Approval or rejection by the Commission

20. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved Nestlé shall appoint or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved Nestlé shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Parties

21. If all the proposed Trustees are rejected Nestlé shall submit the names of at least two more individuals or institutions within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 17 and 20.

Trustee nominated by the Commission

22. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom Nestlé shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. Functions of the Trustee

23. The Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or the Parties, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

24. The Monitoring Trustee shall:

(i) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision.

(ii) oversee the on-going management of the Divestment Businesses with a view to ensuring their continued economic viability, marketability and competitiveness and monitor compliance by the Parties with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:

(a) monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Businesses, and the keeping separate of the Divestment Businesses from the business retained by the Parties, in accordance with paragraphs 7 and 8 of the Commitments;

(b) supervise the management of the Divestment Businesses as a distinct and saleable entity, in accordance with paragraph 9 of the Commitments;

(c) (i) in consultation with the Parties, determine all necessary measures to ensure that the Parties do not after the effective date obtain any business

secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Businesses, in particular strive for the severing of the Divestment Businesses' participation in a central information technology network to the extent possible, without compromising the viability of the Divestment Businesses, and (ii) decide whether such information may be disclosed to the Parties as the disclosure is reasonably necessary to allow Nestlé to carry out the divestiture or as the disclosure is required by law;

(d) monitor the splitting of assets and the allocation of Personnel between the Divestment Businesses and the Parties or Affiliated Undertakings;

(iii) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;

(iv) propose to the Parties such measures as the Monitoring Trustee considers necessary to ensure the Parties' compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Businesses, the holding separate of the Divestment Businesses and the non-disclosure of competitively sensitive information;

(v) review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process,

(a) potential purchasers receive sufficient information relating to the Divestment Businesses and the Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and

(b) potential purchasers are granted reasonable access to the Personnel;

(vi) provide to the Commission, sending the Parties a non-confidential copy at the same time, a written report within 15 days after the end of every month. The report shall cover the operation and management of the Divestment Businesses so that the Commission can assess whether the business is held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the Commission, sending the Parties a non-confidential copy at the same time, if it concludes on reasonable grounds that the Parties are failing to comply with these Commitments;

(vii) within one week after receipt of the documented proposal referred to in paragraph 16, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser(s) and the viability of the Divestment Businesses after the sale and as to whether the Divestment Businesses is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the sale of the Divestment Businesses without one or more Assets or not all of the Personnel affects the viability of the Divestment Businesses after the sale, taking account of the proposed purchaser(s).

Duties and obligations of the Divestiture Trustee

25. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Businesses to a purchaser(s), provided that the Commission has approved both the purchaser(s) and the final binding sale and purchase agreement in accordance with the procedure laid down in paragraph 16. The Divestiture Trustee shall include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of Nestlé, subject to Nestlé's unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.

26. In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to the Parties.

III. Duties and obligations of Nestlé

27. Nestlé shall provide and shall cause its advisors to provide the Trustee with all such cooperation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of Nestlé's or the Divestment Businesses' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and Nestlé and the Divestment Businesses shall provide the Trustee upon request with copies of any document. Nestlé and the Divestment Businesses shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.

28. Nestlé shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Businesses. This shall include all administrative support functions relating to the Divestment Businesses which are currently carried out at headquarters level. Nestlé shall provide and shall cause their advisors to provide the Monitoring Trustee, on request, with the information submitted to potential Purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. Nestlé shall inform the Monitoring Trustee on possible purchasers, submit a list of potential purchasers, and keep the Monitoring Trustee informed of all developments in the divestiture process.

29. Nestlé shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale, the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, Nestlé shall cause the documents required for effecting the sale and the Closing to be duly executed.

30. Nestlé shall indemnify the Trustee and its employees and agents (each an "Indemnified Party") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to Nestlé for any liabilities arising out of the performance of the Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.

31. At the expense of Nestlé, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to Nestlé's approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should Nestlé refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard Nestlé. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 30 shall apply mutatis mutandis. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served Nestlé during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

IV. Replacement, discharge and reappointment of the Trustee

32. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a conflict of interest:

    (a) the Commission may, after hearing the Trustee, require Nestlé to replace the Trustee; or

    (b) Nestlé, with the prior approval of the Commission, may replace the Trustee.

33. If the Trustee is removed according to paragraph 32, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 17-22.

34. Beside the removal according to paragraph 32, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

Section F. The Review Clause

35. The Commission may, where appropriate, in response to a request from the Parties showing good cause and accompanied by a report from the Monitoring Trustee:

(i) grant an extension of the time periods foreseen in the Commitments, or

(ii) waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments. Where the Parties seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances

shall the Parties be entitled to request an extension within the last month of any period.

SCHEDULE

The Divestment Businesses consist of the entire healthcare nutrition business of Novartis in France (apart from the "Impact" products), the Crucial products sold by the healthcare nutrition business of Nestlé in France and the entire healthcare nutrition business of Nestlé in Spain.

Healthcare Nutrition Business in France

1 The healthcare nutrition business of Novartis in France consists of the business of Novartis Nutrition S.A.S. (***NMN France***) which will be 100% owned by Nestlé after the closing of the Proposed Transaction. All the shares in NMN France shall be transferred to the Purchaser as part of the Divestment Business. Furthermore, certain assets not belonging to NMN France shall also form part of the Divestment Business and be transferred to the Purchaser as specifically described below.

2 NMN France is active in the marketing, distribution and sale of Enteral Healthcare Nutrition Products and enteral healthcare devices related to Enteral Healthcare Nutrition Products to customers located in France.

3 NMN France is the only entity of the healthcare nutrition business of Novartis that provides services to customers located in France. NMN France is located at Bureaux Sis 10, Rue de la Decouverte, a Labege (31). NMN France has no subsidiaries.

4 An organigram of NMN France, its sales department and its sales force is included in […] to this Schedule.

5 The French Divestment Business includes, but is not limited to:

(a) the following main tangible assets:

- inventory and working capital;
- office furniture;
- computer equipment;
- lease contracts for […] number of cars
- […] number of mobile phones; and
- kitchen items;

(b) the following main intangible assets;

- an exclusive licence for the use of all trademarks connected with the following Novartis products sold in France:

  (i) Isosource Energy Isosource Fiber; Isosource Junior; Isosource Standard;

  (ii) Novasource Diabet; Novasource GIC; Novasource Megareal; Novasource Megareal Fiber; Novasource Peptid;

(iii) Resource 2.0; Resource 2.0 Fiber; Resource Carogil; Resource Cereal Instant; Resource Cereals; Resource Cream; Resource Cream Dessert Energy; Resource Cream Diabetes; Resource Cream Plus; Resource Dextrinemaltose; Resource Diabetic; Resource Energy 1.5; Resource Energy Fiber; Resource Fruit; Resource Gelified Water; Resource Junior; Resource Protein; Resource Protein Instant; Resource Protein Plus; Resource Prunogil; Resource Pure/Mixes Instant; Resource Pureed Fruit RTU; Resource Pureed Meals RTU; Resource Rhubagil; Resource Soup; Resource Support; Resource ThickenUp; and

(iv) Compat;

and any related domain names (i.e. compat.fr and isosource.fr) for a period of 5 years within which the licensee will re-brand the product (for further details about the trademarks to be licensed please see […]);

- an exclusive licence for the use of the Nestlé Crucial brand in France for a period of 5 years within which the licensee will re-brand the product (for further details about the Nestlé brand rights and the patents to be licensed for France please see […]);

- if so requested by the purchaser, a non exclusive licence for the use of the Nestlé and Novartis parent company brands in the company name and on packaging, signs, letterhead, communication material of nutritional healthcare products for which the use of the brands is to be licensed and which are already branded with the Nestlé or Novartis brand name, for a maximum period of 12 months from closing of the acquisition of the NMN business from Novartis by Nestlé;

- an exclusive licence for the use in France of all patents related to the licensed products for a period of […]followed by a non exclusive license for the lifetime of the patents (for further details about the NMN patents to be licensed please see […]);

- an exclusive right to use in France all trade secrets and know-how relating to the products for which the use of the brands is to be licensed for a period […]; in particular this shall include all related:

(i) formula / recipes;

(ii) manufacturing processes (to the extent that such information is proprietary to Nestlé or Novartis; i.e. not already in the public domain); and

(iii) all available pre-clinical, clinical and marketing data.

All these licenses are fully paid up (i.e. the Purchaser of the French Divestment Business will not have to pay any royalty rates for any of the licenses as these will have been included in the purchase price to be paid for the French Divestment Business).

(c) the following main licences, permits and authorisations:

- national registration for declaration of electronic waste;

(d) the following main contracts, agreements, leases, commitments and understandings:

- all customer contracts;
- an agreement with […]for warehousing and logistics services;
- an agreement with […]for the lease of office space;
- an agreement with […] for the distribution of products in Corsica;
- an agreement for the maintenance of pumps; and
- the commercial agreements listed in […];

(e) the following customer, credit, clinical and other records:

- all customer lists with contact details, overdue lists with details per customer, credit terms, credit limits and inventory;
- all existing clinical data relating to the licensed branded products (e.g. full copies of clinical trials, statistical analysis, etc.);

(f) the following Personnel:

- approximately […]personnel

[…];

(g) the following Key Personnel:

[…]

(h) the supply of the products and packaging for which the use of the brands is to be licensed […], by Nestlé or Affiliated Undertakings for a period of up to 3 years after Closing;

(i) if so requested by the purchaser, Nestlé will use its best efforts to transfer parts of its existing co-manufacturing and co-packing arrangements with third parties to the extent that they relate to products for which the use of the brands is to be licensed;

(j) if so requested by the purchaser, the arrangements for the supply of the services that NMN France currently obtains from Novartis (which consist only of IT and HR benefit services) by way of assignment of the benefit of the transitional services agreement as agreed between Novartis and Nestlé for a period of up to 12 months after closing of the acquisition of the NMN business from Novartis (note that some of these services, notably IT, are provided to Novartis by third parties; the assignment is therefore limited to the duration of these agreements entered into by Novartis with third parties and may therefore be shorter than 12 months); and

(k) for use in France access to the R&D work that is in progress to support the new product launches planned in France within 12 months from Closing and all assistance reasonably requested for that purpose.

6 The Divestment Businesses shall not include:

(a) in the case of a licence – the assignment or any other legal transfer of the ownership of the intellectual property rights;

(b) in the case of a licence - the right of the Purchaser(s) to use the intellectual property, trade secrets or know how in any jurisdiction other than those that are specified in the respective licence agreements or for any purpose other than the sale of Enteral Healthcare Nutrition Products;

(c) any tangible manufacturing assets, in particular the manufacturing assets of Novartis in Osthofen, Germany or Nestlé in Cruelly, France;

(d) access to any new development as to IP, know-how, recipes, packaging or design other than mentioned under section 5 above.

Healthcare Nutrition Business of Nestlé in Spain

7 The healthcare nutrition business of Nestlé in Spain forms part of the business of Nestlé España SA. The assets, business and Personnel detailed below form the healthcare nutrition business that form part of the Divestment Business and will be transferred to the Purchaser (***NHC Spain***).

8 NHC Spain is currently located at Sede central Nestlé España SA, Edicicio Nestlé, 08950 Esplugues de Llobregat, Barcelona NHC Spain is active in the marketing, distribution and sale of enteral healthcare nutrition products in Spain.

9 An organigram of NHC Spain is included in […]to this Schedule.

10 The Spanish Divestment Business includes, but is not limited to:

(a) the following main tangible assets:

- inventory;
- lease contracts for […] cars;
- […] mobile phones; and
- […] computers.

(b) the following main intangible assets:

- an exclusive licence for the use of all trademarks connected with the Nestlé products in Spain:

  (i) Clinutren 1.5; Clinutren 1.5 fibre; Clinutren Dessert; Clinutren Fruit; Clinutren G; Clinutren HP Energy; Clinutren Iso; Clinutren Repair; Clinutren Soup

  (ii) Modulen IBD

  (iii) Peptamen

  (iv) Sondalis 1.5; Sondalis Diabetes; Sondalis Estandar; Sondalis Estandar Fibra; Sondalis Fibre; Sondalis HP; Sondalis Iso;

for a period of 5 years within which the licensee will re-brand the product (for further details about the trademarks to be licensed please see […]);

- if so requested by the purchaser, a non exclusive licence for the use of the Nestlé parent company brand on packaging, signs, letterhead, communication material of nutritional healthcare products for which the use of the brands is to be licensed and which are already branded with the Nestlé brand name, for a maximum period of 12 months from closing of the acquisition of the NMN business from Novartis by Nestlé;

- an exclusive licence for the use in Spain of all patents related to the licensed products for a period of […] (for further details about the NHC patents to be licensed please see […]);

- an exclusive right to use in Spain all trade secrets and know-how relating to the products for which the use of the brands is to be licensed for a period of 3 years followed by a non exclusive, perpetual license for the trade secrets and know-how; in particular this shall include all related:

  (i) formula / recipes;

  (ii) manufacturing processes (to the extent that such information is proprietary to Nestlé; i.e. not already in the public domain); and

  (iii) all available pre-clinical, clinical and marketing data.

All these licenses are fully paid up (i.e. the Purchaser of the Spanish Divestment Business will not have to pay any royalty rates for any of the licenses as these will have been included in the purchase price to be paid for the Spanish Divestment Business).

(c) the licences, permits and authorisations listed in […];

(d) the following main contracts, agreements, leases, commitments and understandings:

- all customer contracts; and

- a warehousing agreement with[…]for the provision of warehousing and delivery services;

(e) the following customer, credit and other records:

- all customer lists with contact details, overdue lists with details per customer, credit terms, credit limits and inventory of NHC Spain;

(f) the following Personnel:

- approximately […]split as follows:

[…]

(g) the following Key Personnel:

[…]

(h) the supply of the products and packaging for which the use of the brands is to be licensed […], by Nestlé or Affiliated Undertakings for a period of up to 3 years after Closing;

(i) if so requested by the purchaser, Nestlé will use its best efforts to transfer parts of its existing co-manufacturing and co-packing arrangements with third parties to the extent that they relate to products for which the use of the brands is to be licensed;

(j) if so requested by the purchaser a transitional supply arrangement for all services that NHC Spain currently obtains from other Nestlé companies or Affiliated Undertakings (including finance, administration, human resources, supply chain planning and IT information services), for a transitional period of up to 12 months after Closing […]; and

(k) for use in Spain access to the R&D work that is in progress to support the new product launches planned in Spain within […]from Closing and all assistance reasonably requested for that purpose.

11 The Divestment Businesses shall not include:

(a) any tangible manufacturing assets, in particular the manufacturing assets of Nestlé in Creully, France;

(b) in the case of a licence – the assignment or any other legal transfer of the ownership of the intellectual property rights;

(c) in the case of a licence - the right of the Purchaser(s) to use the intellectual property, trade secrets or know how in any jurisdiction other than those that are specified in the respective licence agreements or for any purpose other than the sale of Enteral Healthcare Nutrition Products; and

(d) access to any new development as to IP, know how, recipes, packaging or design which other than mentioned under section 10 above.